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CAS v. MPPL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[WRIT NO: WA-22F-1-05-2019
(ORIGINALLY ORIGINATING SUMMONS NO: WA-24F-107-07-2015)]
B 21 JUNE 2022

Abstract – *Case laws are replete with decisions that the courts are not seized with the power, in civil proceedings, to compel adults to produce deoxyribonucleic acid ('DNA') samples to prove the paternity of a child. However, it has never been discussed nor decided whether the courts could order for a child to undergo a DNA test to determine the child's paternity. In this distinctive judgment, a prima facie case was established as there was an avalanche of evidence that there existed sexual relations during the conception period of the child, between parties engaging in an extra-marital affair. Also present were overwhelming documentary evidence of an intimate relationship akin to that of a family unit. As it was in the best interest of the child to know her biological father, the child was accordingly ordered to undergo a DNA test to conclusively resolve the ambiguity as to her paternity.*

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FAMILY LAW: *Children – Paternity – Determination of biological father of child – Claim by third party man to be biological father of child conceived during marriage of husband and wife – Whether prima facie case established – Whether there was sexual intercourse between wife and man before her marriage to her husband and during her marriage – Whether sexual intercourse took place between wife and man during conception period of child – Whether man had access to child after child's birth – Whether man provided maintenance for child – Whether court seized with power to order DNA test on child to determine paternity – Whether court ought to order child to undergo DNA test*

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The defendants were husband ('second defendant') and wife ('first defendant') and they were married on 3 March 2007. In the course of the marriage, the first defendant gave birth to a child on 23 June 2008. The plaintiff claimed to be the biological father of the said child as, according to him, (i) he and his mother were told so by the first defendant herself; (ii) he had sexual relations with the first defendant prior to the latter's marriage with the second defendant and this continued on until around January 2014, during the first defendant's marriage to the second defendant; (iii) he had access to the child since her birth until December 2013; and (iv) he had provided the first defendant with maintenance for the child until around August 2014, when the first defendant closed her bank account. The plaintiff filed originating

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summons ('OS') at the High Court, seeking, *inter alia*, for an order for a deoxyribonucleic acid ('DNA') test to be conducted on the child to determine her paternity. The defendants, in denying the plaintiff's averments, filed an application under O. 14A of the Rules of Court 2012, to dismiss the OS on the grounds that, pursuant to the presumption of legitimacy under s. 12 of the Evidence Act 1950, the fact that the child was born during the first defendant's valid marriage to the second defendant was conclusive proof that the child was the legitimate child of the second defendant. The High Court allowed the defendants' application and summarily dismissed the plaintiff's OS. However, upon the plaintiff's appeal, which was allowed, the Court of Appeal set aside the decision of the High Court and directed that the plaintiff's OS be converted into a writ action to enable the factual disputes to be determined by way of *viva voce* evidence of witnesses. The defendants' appeal to the Federal Court was unsuccessful. Hence, the present writ action by the plaintiff for an order for the child to undergo a DNA test to determine her paternity. Despite the defendants' denial in the OS, the appeals to the Court of Appeal and the Federal Court and their pleadings in this writ action, of sexual relations between the plaintiff and the first defendant, during the trial of this writ action, the first defendant admitted to having had sexual relations with the plaintiff prior to her marriage with the second defendant which continued on during her marriage until January 2014. The issues that arose for determination were: (i) whether there was sexual intercourse between the plaintiff and the first defendant before her marriage to the second defendant and during her marriage, especially around September 2007; (ii) whether the plaintiff had access to the child after her birth until December 2013; (iii) whether the plaintiff provided the first defendant maintenance for the child until the first defendant closed her bank account; and (iv) whether the court has the power to order a DNA test on the child to determine whether the plaintiff was the biological father of the child and, if so, ought such an order be made.

Held (ordering child to undergo DNA test to determine her paternity):

(1) Any man who claims to be the biological father of a child must, at least, establish a *prima facie* case that he had sexual relations during the period the child was conceived ('conception period') and provide other supporting evidence to validate his claim that he may be the biological father of the child before a court could make an order that the child undergo a DNA test to determine his/her paternity. (para 27)

(2) The child was born on 23 June 2008. She could have been conceived between the dates of 13 September 2007 and 20 October 2007. (paras 58 & 133)

(3) The plaintiff was a pilot while the first defendant was a flight attendant and they served the same airline. The second defendant was a pilot too but for a different airline. The first defendant testified that she would meet up with the plaintiff when both the plaintiff and the first defendant

were in the country and the second defendant was out of the country on his flight duties. Thus, her clarification that the second defendant was back in Kuala Lumpur 'earlier of the month' of September and from 22 September 2007, meant that there were several days in September 2007 between 'earlier of the month' and 22 September 2007 that the first defendant and the plaintiff could have met up and engaged in sexual intercourse. The fact that the unaccounted days in September 2007 fell within the conception period of the child, supported the plaintiff's case that there were sexual relations between him and the first defendant during the conception period, especially around September 2007. (paras 6, 95 & 96)

(4) The documents and photographs adduced, together with the fact that (i) the first defendant had invited the plaintiff to the hospital after the birth of the child, particularly since she said that he was the only non-family member who had visited her and the child in the hospital; (ii) she had invited him to her matrimonial home two weeks after the child's birth after the second defendant had gone back to work in Singapore; and (iii) she told the plaintiff's mother that the plaintiff was the child's father, proved that she had told the plaintiff that he was the father of the child. (para 125)

(5) There were photographs of the plaintiff and the first defendant celebrating the child's first birthday together with friends, going on holidays together and taking the child for outings. These were the activities that parents would do with their children. These photographs showed that the plaintiff and the first defendant had an intimate relationship where the plaintiff acted as a father figure while the first defendant acted as a mother figure of the child. Furthermore, any third party looking at the videos of the plaintiff, the first defendant and the child would conclude that they were a family unit. The photographs and videos therefore showed that the plaintiff had access to and was involved in the child's life from her birth until his access to the child was stopped by the first defendant in December 2013. (paras 191, 193 & 194)

(6) The plaintiff's case was that he had contributed financially to the child's maintenance since she was born until the first defendant closed her bank account in August 2014. The defendants denied that the plaintiff had paid any maintenance for the child. Nevertheless during trial, the first defendant admitted that the plaintiff did pay RM1,000 monthly in her bank account but the monies were for her and not maintenance for the child. However, the defendants did not provide any documentary evidence to support the above; they also did not provide any evidence to prove that the child's expenses and maintenance were all borne by the

second defendant. Accordingly, the defendants failed to discharge their burden of proof. It followed that the plaintiff had successfully proved that he paid monies for the maintenance of the child into the first defendant's bank account until she closed the said account. (paras 206, 210, 216 & 217)

(7) The plaintiff had discharged his burden of proof, on a balance of probabilities, that (i) he had intimate and sexual relations with the first defendant prior to and during her marriage to the second defendant until January 2014; (ii) he had sexual relations with the first defendant during the child's conception period, particularly in September 2007; (iii) the first defendant had told him that he was the father of the child; (iv) he did have access to and was involved in the child's life since her birth until December 2013; and (v) he had provided the first defendant monies for the child's maintenance until she closed her bank account. (paras 97, 126, 195 & 218)

(8) The plaintiff had established a *prima facie* case that he had sexual relations with the first defendant during the child's conception period, particularly September 2007, and that he may be the biological father of the child. Once the child's mother *ie*, the first defendant, admitted to having sexual relations with the plaintiff, and once the court had made the finding of fact that the first defendant had sexual relations with the plaintiff during the child's conception period, the serious question arose – who was the biological father of the child; the second defendant or the plaintiff? It could be either of them. The only way the question of the child's paternity could be resolved conclusively was by way of DNA test. Courts, as *parens patriae*, have the power to order that a child undertake a DNA test for the purposes of determining his/her paternity. (paras 287 & 303)

(9) It was in the child's best interest to undergo a DNA test to determine her paternity. The first defendant and/or second defendant were ordered to bring the child to Hospital Tunku Azizah ('hospital') within seven days from the service of the order on the first defendant and/or the second defendant to enable the hospital to take all necessary steps to obtain specimens, by intimate or non-intimate means as decided by a medical professional at the hospital, from the child and the plaintiff, in order for a DNA test be carried out to determine the child's paternity in relation to the plaintiff. (paras 306 & 308)

***Obiter*:**

(1) The court had the opportunity to observe the facial features of the child in the videos and the photographs submitted, particularly those submitted by the defendants showing the child at an older age of approximately 12 years. Comparing the facial features of the child with that of the plaintiff and the defendants, who were observed physically

in court, it appeared that the child's features were a combination of the plaintiff's and the first defendant's facial features. Nonetheless, the law is settled that facial resemblance is not relevant evidence of paternity. Therefore, the court could not take into account any facial resemblance between the child and the plaintiff as relevant evidence in this action. (paras 220 & 221)

(2) If the DNA results show that the plaintiff is the child's biological father, it would be in the child's best interest and welfare that the plaintiff be re-introduced to her gradually and under the guidance and advice of a qualified child psychologist with experience in the disclosure of the biological origins/parents of children. (para 307)

Case(s) referred to:

AD v. AE [2005] SGHC 30 ***(refd)***
Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***
Anderson v. Spencer [2018] EWCA Civ 100 ***(refd)***
Armagas Ltd v. Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1 ***(refd)***
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523 HC ***(refd)***
B (BR) v. B(J) [1968] P466 ***(refd)***
Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another (2010) 8 SCC 633 ***(refd)***
Britestone Pte Ltd v. Smith & Associates Far East Ltd [2007] 4 SLR 855 ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
CAS v. MPPL & Anor [2019] 2 CLJ 454 CA ***(refd)***
Goutam Kundu v. State of West Bengal [1993] SC 2295 ***(refd)***
In Re L (An Infant) [1967] 3 WLR 1645 ***(refd)***
In re Spence (1847) 2 Ph 247 ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Lau Zhan Chen (An Infant By His Mother And Next Friend Lau Fatt Wan (f)) v. Makoto Togase & Ors [1995] 1 CLJ 841 HC ***(refd)***
Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik [2017] 6 CLJ 668 HC ***(refd)***
Lee Lai Ching v. Lim Hooi Teik [2013] 4 CLJ 107 HC ***(refd)***
Lim Hooi Teik v. Lee Lai Cheng (As Next Of Kin To Lee Chee Zheng And On Her Behalf) [2016] 3 CLJ 529 CA ***(refd)***
Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 124A; [1981] CLJ (Rep) 65 FC ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Melawangi Sdn Bhd v. Tiow Weng Theong [2020] 4 CLJ 1 FC ***(refd)***
Mohamed Alias v. PP [1981] 1 LNS 200 HC ***(refd)***
MPPL & Anor v. CAS (02(f)-14-03-2018(W) (Unreported) ***(refd)***
Nanji & Co v. Jatashankar Dossa & Ors AIR 1961 SC 1474 ***(refd)***
Ng Chian Perng v. Ng Ho Peng [1998] 2 CLJ (Supp) 227 HC ***(refd)***

Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors [2012] 1 CLJ 769 HC ***(refd)***
Pathmanabhan Nalliannen v. PP & Other Appeals [2017] 4 CLJ 137 FC ***(refd)***
Peter James Binsted v. Jevencia Autor Partosa [2000] 2 CLJ 906 HC ***(refd)***
PP v. Gan Boon Aun [2017] 4 CLJ 41 FC ***(refd)***
PP v. Hoo Chee Keong [1997] 2 CLJ Supp 357; [1997] 2 BLJ 357 HC ***(refd)***
Raghavamma v. Chenchamma AIR 1964 SC 136 ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
SCT Technologies Pte Ltd v. Wester Copper Co Ltd [2015] SGCA 7 ***(refd)***
Selvi Vijayalakshmi v. A Sankaran and Another [2017] 4 MLJ (Madras Law Journal) 463 ***(refd)***
Sharda v. Dharmpal (2003) 4 SCC 493 ***(refd)***
Shri Rohit Shekar v. Shri Narayan Dutt Tiwari & Anr (IA No. 4720/2008 in CA(OS) 700-2008) (Unreported) ***(refd)***
Spencer v. Spencer And Others [2016] EWHC 851 (Fam) ***(refd)***
Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 4 CLJ 354 CA ***(refd)***
STU v. The Comptroller Of Income Tax [1962] 1 LNS 179 HC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Tiow Weng Theong v. Melawangi Sdn Bhd [2019] 2 CLJ 655 CA ***(refd)***
Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***
TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications [2019] 10 CLJ 436 FC ***(refd)***
Wong Sieng Ping v. PP [1967] 1 MLJ 56 ***(refd)***

Legislation referred to:
Adoption Act 1952, s. 25A(5)
Births and Deaths Registration Act 1957, ss. 7(2), 13, 14, 17(1)(a), (b), s. 32(2)
Civil Law Act 1956, s. 3(1)
Courts of Judicature Act 1964, s. 24(d)
Evidence Act 1950, ss. 57(2), 59, 60, 101, 102, 103, 106, 112, 114
Federal Constitution, art. 160(2)
Guardianship of Infants Act 1961, s. 11
Interpretation Acts 1948 and 1967, s. 3
Penal Code, s. 319
Rules of Court 2012, O. 14A, O. 92 r. 4

Code of Civil Procedure 1908 [India], s. 151
Evidence Act 1872 [India], s. 112
Evidence Act 1893 [Sing], s. 114(1)(a), (b)
Family Law Reform Act 1969 [UK], s. 20(1)

Other source(s) referred to:
Mongelli, Max *et al*, *Estimating the date of confinement: Ultrasonographic biometry versus certain menstrual date*, American Journal of Obstetrics Gynaecology, Vol 174, Issue 1, Part 1, January 1996, pp 278-281

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Reported by Najib Tamby

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JUDGMENT

Faizah Jamaludin J:

Introduction

[1] Do courts in Malaysia have the power to order a child to undergo a B deoxyribonucleic acid ("DNA") test to determine paternity? Whilst the High Court has held that it does not have the power in civil proceedings to compel adults to produce DNA samples to prove the paternity of a child, the question of whether courts in Malaysia have the power to make an order for a child to undergo a DNA test to ascertain the child's paternity, has yet to C be decided.

[2] The plaintiff had brought this action for an order of court for a child (referred to as "child C" or "the child" in this judgment) to undergo a DNA test to determine her paternity.

D **[3]** The first and second defendants are husband and wife. They were married on 3 March 2007. The first defendant gave birth to child C on 23 June 2008, whilst married to the second defendant.

[4] The plaintiff claims that he is the biological father of child C. He claims to have had sexual relations with the first defendant prior to her E marriage with the second defendant, and that their sexual relations continued until around January 2014. He also claims to have had access to the child since her birth until December 2013 and that he had provided monies to the first defendant for the child's maintenance until around August 2014.

[5] In November 2015, the plaintiff filed an originating summons ("OS") F seeking, among others, for an order of court for a DNA test to be conducted on child C to determine her paternity.

[6] At the material time, the plaintiff was a pilot with a Malaysian based airline and the first defendant was an air stewardess/flight attendant in the same airline. The second defendant was a pilot with a Singapore based G airline.

[7] The defendants strenuously opposed the plaintiff's application in the OS. They filed an application under O. 14A of the Rules of Court 2012 to dismiss the OS on the grounds that pursuant to the presumption of legitimacy in s. 112 of the Evidence Act 1950 ("EA"), the fact that child C was born H during the first defendant's valid marriage to the second defendant is conclusive proof that child C is the legitimate child of the second defendant.

[8] In their affidavits in the OS, the defendants had denied all the plaintiff's claims, including that he had intimate and sexual relations with the I first defendant prior to and during her marriage to the second defendant.

[9] The High Court allowed the defendants' O. 14A application and summarily dismissed the plaintiff's OS.

[10] The plaintiff appealed the High Court's decision. The Court of Appeal allowed the plaintiff's appeal and set-aside the High Court's order: see *CAS v. MPPL & Anor* [2019] 2 CLJ 454; [2018] 8 AMR 525, [2019] 4 MLJ 243 ("*CAS v. MPPL & Anor (No. 1)*").

[11] The Court of Appeal held that legitimacy and paternity are two distinct, though interrelated concepts. In its judgment, the Court of Appeal held that legitimacy is a question of law, whilst paternity is a question of fact. Thus, the presumption of legitimacy in s. 112 of the EA does not bar enquiry into a person's paternity.

[12] The Court of Appeal found that the High Court Judge fell into error in having summarily dismissed the plaintiff's application pursuant to s. 112 of the EA, without first determining the facts of the case. It held:

> In our reading of the affidavits in this action, it is as plain as pikestaff that the defendants deny many of the allegations made by the plaintiff in respect of his purported relationship with the first defendant and child C. These are crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination can only be made with full *viva voce* evidence.

[13] Because of these disputed facts, the Court of Appeal directed that the plaintiff's OS be converted into a writ action to enable the factual disputes to be determined by way of *viva voce* evidence of witnesses.

[14] The defendants obtained leave to appeal to the Federal Court against the Court of Appeal's decision. On 29 January 2019, the Federal Court affirmed the Court of Appeal's judgment and dismissed the defendants' appeal: see *MPPL & Anor v. CAS* (02(f)-14-03-2018(W) – 29 January 2019).

This Writ Action

[15] In the OS and the appeals before the Court of Appeal and the Federal Court, the defendants had denied the plaintiff's claim of sexual relations between him and the first defendant before and during her marriage to the second defendant. They continued to deny the plaintiff's claims in their statement of defence in this writ action.

[16] There were various issues to be tried filed by the parties prior to the trial of this action, which issues can be categorised into the following broad categories, namely:

(i) whether there was sexual intercourse between the plaintiff and the first defendant, before her marriage to the second defendant and during her marriage, especially around September 2007;

(ii) whether the plaintiff had access to child C after her birth until December 2013;

A (iii) whether the plaintiff provided the first defendant maintenance for child C until the first defendant closed her bank account at Maybank; and

(iv) whether this court has the power to order a DNA test on the child to determine whether the plaintiff is the biological father of the child, and
B if so, ought such an order be made?

[17] The first three issues are questions of fact, and the fourth issue is a question of law.

[18] The Court of Appeal in *CAS v. MPPL & Anor (No. 1)* held that the
C question of law is to be decided by this court after determination of the factual issues.

[19] Notwithstanding the defendants' denial in their pleadings of sexual relations between the plaintiff and the first defendant, during the trial of this writ action, the first defendant admitted that she had sexual relations with the
D plaintiff prior to her marriage to the second defendant. She testified that her sexual relationship with the plaintiff continued during her marriage until January 2014.

Question Of Fact: Has The Plaintiff Made Out A *Prima Facie* Case For A
E **DNA Test On The Child To Determine Her Paternity?**

[20] The Court of Appeal in *CAS v. MPPL & Anor (No.1)* had tasked this court to find the "factual matrix" of this case before it can go on to decide whether it has the power to order a DNA test on a child to determine her paternity.

F **[21]** The principal question before this court is what are the facts that must be proved for the plaintiff to make a *prima facie* case to support his application for a DNA test on the child to prove her paternity. Is it sufficient that he proves that he had sexual relations with the first defendant before and during her marriage to the second defendant? Or must he prove on a balance of
G probabilities that he had sexual intercourse with her during the period child C was conceived?

[22] The Court of Appeal in *Lim Hooi Teik v. Lee Lai Cheng (As Next Of Kin To Lee Chee Zheng And On Her Behalf)* [2016] 3 CLJ 529 ("*Lim Hooi Teik*") held that the plaintiff mother must make out a *prima facie* case against the
H defendant that she was in an intimate relationship with him before the court can order that the defendant undergo a DNA test to determine her child's paternity. Vernon Ong JCA (as he then was) held:

> [26] We take the view that at the very least, the plaintiff ought to have produced evidence to prove that fact of the relationship as pleaded; and
I that such relationship once proven would warrant the making of an order to compel the defendant to undergo a DNA test for the purpose of determining the paternity of the minor.

[23] By reason of the first defendant's admission of her sexual relationship with the plaintiff prior to and during her marriage to the second defendant, premised on the Court of Appeal's judgment in *Lim Hooi Teck*, the plaintiff would have sufficiently discharged his burden of proving a *prima facie* case that would warrant this court to consider the question of law of whether it can make an order for child C to undergo a DNA test to determine her paternity.

[24] The Court of Appeal's judgment in *Lim Hooi Teck*, relates to an application for a DNA test on the putative biological father of a child. It held that proof of sexual relations between the applicant mother and the putative biological father was sufficient for the court to order a DNA test on the putative father to determine the paternity of the child.

[25] However, in this instant action, the plaintiff applicant is a person who claims to be the putative biological father of the child and his application is for an order for a DNA test on the child to determine her paternity.

[26] It is my view that in an application for a DNA test on a child (as opposed to an adult) for purposes of determining the said child's paternity, a *prima facie* case of sexual relationship between an applicant and the mother of the said child is not sufficient for a court to order that the said child undergo a DNA test to determine his or her paternity. To my mind, it would open the floodgates where any man who makes out a *prima facie* case of sexual relations with a woman may obtain a court order for a DNA test on a child born to the said woman.

[27] In my view, any man who claims to be the biological father of a child must at least make a *prima facie* case that he had sexual relations during the period the child was conceived ("conception period") and provide other supporting evidence to validate his claim that he may be the biological father of the child before a court can make an order that the child undergo a DNA test to determine his or her paternity.

When Was Child C's Conception Period?

[28] The possible conception period of a child is determined by the length of human pregnancy. It is a matter of science, particularly biology. Section 57(2) of the EA empowers a court in all matters of science to resort for its aid to appropriate books or documents of reference. Section 57(2) of the EA reads as follows:

> (2) In all these cases, and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

[29] In determining the likely conception period of the child in this instant action, this court had referred to the studies by Mongelli, Max *et al.*, entitled "*Estimating the date of confinement: Ultrasonographic biometry versus certain menstrual date*", published in the *American Journal of Obstetrics Gynaecology*,

Vol. 174, Issue 1, Part 1, pp. 278 to 281, January 1996, (the "*Mongelli Study*") and by A.M. Jukic *et al*, entitled "*Length of Human Pregnancy and Contributors to its Natural Variation*", published by Oxford University Press on behalf of the European Society of Human Reproduction and Embryology 2013 (the "*Jukic Study*").

[30] The studies show that doctors estimate the approximate time when a child was conceived based on the mother's last menstrual period (LMP) or by ultrasound. The *Jukic Study* states that whilst it is a common clinical practice to assign pregnant woman a due date based on 280 days from their last menstrual period (LMP), the *Mongelli Study* found that only 4% of women deliver at 280 days and only 70% deliver within ten days of their estimated due date, even when the date is estimated by ultrasound.

[31] The *Jukic Study* is a scientific study on the length of human pregnancy and the natural variation in the length of healthy pregnancies. It found that the ovulation to birth ranged from 247 to 284 days, where the variation in pregnancy length spanned 37 days, and that the median time from ovulation to birth was 268 days (38 weeks, two days). The authors of the *Jukic Study* concluded that the implications of their findings of the variation in pregnancy length among healthy pregnancies are as follows:

> Implications
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> *The length of human gestation varies considerably among healthy pregnancies, even when onset of pregnancy is measured by an accurate marker of ovulation. This variability is greater than suggested by the clinical assignment of a single 'due date'.* The duration of previous pregnancies may provide a useful measure of a woman's 'natural' length of pregnancy and may help in predicting an individual woman's due date. We also found that events in the first 2 weeks after conception were strongly predictive of the total length of pregnancy, suggesting that the trajectory for the timing of delivery may be set in early pregnancy.
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> (emphasis added)

[32] From the *Mongelli Study* and the *Jukic Study* cited above, it is clear no one can pinpoint the exact date of conception, since the length of human gestation varies. As the *Jukic Study* found the variation of the length of healthy pregnancies spanned 37 days.

[33] What we know is that child C was born on 23 June 2008. The *Jukic Study* shows that ovulation to birth ranged from 247 to 284 days and that the median time from ovulation to birth is 268 days. Accordingly, child C could have been conceived between the dates of 13 September 2007 (284 days of conception) and 20 October 2007 (247 days of conception).

[34] Therefore, I find that child C's conception period was between 13 September 2007 and 20 October 2007.

Analysis Of The Evidence

[35] The trial of this writ action was heard over 11 non-consecutive days. five witnesses including the plaintiff testified on behalf of the plaintiff and two witnesses – the first defendant and the second defendant – testified on behalf of the defendants. The main witness for the plaintiff is the plaintiff himself ("PW1") and the main witness for the defence is the first defendant ("DW1") herself.

[36] The evidence presented in court during the trial were the oral testimonies of witnesses and documentary evidence. The documentary evidence comprised of emails and WhatsApp messages between the plaintiff and the first defendant, photographs and videos.

[37] It is trite that all facts, except for the contents of documents, may be proved by oral evidence: s. 59 of the EA. The oral evidence is sufficient to prove a fact in the absence of documentary evidence to support it: see for *eg*, *STU v. The Comptroller Of Income Tax* [1962] 1 LNS 179; [1962] 1 MLJ 220. Section 60 of the EA stipulates that the oral evidence must be direct evidence.

[38] The law is settled that evidence produced in a civil action does not require corroboration. Nevertheless, where there is conflicting oral evidence, it falls upon the court to assess the credibility of the oral evidence of the witnesses, by reference to the objective facts and documents proved independently of their testimonies. In this case, much of the oral evidence of the plaintiff and the first defendant, save for the fact they had sexual relations from the end of 2005 until January 2014, conflicts with one another. It is a "he said, she said"– he would say one thing and she would say another.

[39] The House of Lords in *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, 57; [1986] AC 717 held that:

> ... where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

[40] In *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, FC, Chang Min Tat FJ said:

> Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.

[41] In assessing the credibility of a witness' testimony, courts recognise that there will always be discrepancies and contradictions in a witness' testimony, particularly where they have to recall an event that took place a few years prior to the trial. Such discrepancies do not automatically make the witness an unreliable witness and the whole of his/her evidence

A unacceptable. Charles Ho J (as he then was) in *Mohamed Alias v. PP* [1981] 1 LNS 200; [1983] 2 MLJ 172 said that where there are discrepancies in a witness' testimony, it is for the court "having observed the demeanour of the witness and after careful consideration of such discrepancies to accept part of the witness's evidence if it considers them to be true".

B **[42]** However, where a witness demonstrably tells lies, courts as a matter of prudence must scrutinise the witness' oral evidence with great care and test it against the whole of the evidence and the circumstances of the case. Thomson CJ in *Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] 1 MLJ 105b held:

C

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion.

D **[43]** The first defendant has demonstrably told lies in this action and in the OS. Her oral admission during the trial to sexual relations with the plaintiff shows that she had lied in her pleadings. It also shows that she had lied under oath in her affidavits filed in the High Court in the OS, and the appeals to the Court of Appeal and the Federal Court. In the pleadings and in all her affidavits she had denied any sexual relations with the plaintiff, only to later E admit to such sexual relations during the trial of this action.

[44] She had also lied to her husband, the second defendant. Based on the first defendant's own testimony during the trial, she had carried on her extra-marital sexual relationship with the plaintiff for more than six years – she had brought the plaintiff into her marital home since child C was two weeks F old without the second defendant's knowledge.

[45] None of these facts were evident from the defendants' affidavits in the OS and from their pleadings in this action. The defendants' affidavits and pleadings paint a picture of a loving married couple, raising child C in a G strong and secure marriage, and the plaintiff a bounder aiming to destroy the defendants' family unit with his "spurious" claims of sexual relations with the first defendant and his application for a DNA test on child C.

[46] However, the first defendant's admission during the trial of her sexual relations with the plaintiff from 2005 to 2014 and her testimony that she was H attracted to the plaintiff – so much so that she had considered leaving her husband for the plaintiff, tell a completely different story. She told this court that her husband, when home, was very absorbed and focused on child C – he was so "totally preoccupied" with child C that he did not see that she too needed his attention. She said that the plaintiff, in contrast, was focused on I her when he was around. However, she decided not to leave her husband for the plaintiff. She said that she broke-off her relationship with the plaintiff in January 2014 because upon checking the plaintiff's emails and phone, she felt that he was seeing other women and his ex-girlfriends behind her back. In

the first defendant's words expressed during the trial, she had ended her sexual relationship with the plaintiff in January 2014 because of "his lack of commitment, philandering and womanising character".

[47] The first defendant's given reason for terminating her relationship with the plaintiff ties in with the plaintiff's testimony that the first defendant's allegation of his alleged infidelity to her was a constant source of argument between him and the first defendant. This was also evident during the trial where she was visibly distraught when asked during cross-examination about the plaintiff's flirtatious emails to other female flight attendants in the Malaysian based airline.

[48] Therefore, as the first defendant had demonstrably told lies in this writ action, the OS and the appeals to the Court of Appeal and the Federal Court, this court as a matter of prudence must scrutinise the first defendant's oral evidence with great care and test her oral testimony against the whole of the evidence presented during the trial and the circumstances of the case. Section 114 of the EA allows this court to presume the existence of certain facts which it thinks likely to have happened in relation to the facts of this instant action.

[49] The plaintiff testified that he had visited the first defendant and the child at the hospital after her birth and that he had been involved in the child's life since her birth until the first defendant stopped his access to her in December 2013. He also said that he had paid monies to the first defendant in cash and had transferred it into her bank account for the child's maintenance until the first defendant closed her bank account around August 2014.

Burden Of Proof

[50] The phrase "burden of proof" comprises of two distinct concepts, namely, (i) legal burden of proof (*ie*, the burden of establishing a case), and (ii) evidential burden of proof (*ie,* the burden of introducing evidence).

[51] The Federal Court in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, explained the distinction between legal burden of proof and evidential burden of proof. Delivering the Federal Court's judgment, Salleh Abas FJ (as he then was) citing the Indian cases of *Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v. Chenchamma* AIR 1964 SC 136, 143, referred to the legal burden of proof as "burden of proof" and the evidential burden of proof as "onus of proof". His Lordship held:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474 1478 and *Raghavamma v. Chenchamma* AIR 1964 SC 136 143). *The first sense, signified by the expression burden of proof such as referred to*

A *in s. 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue ... The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates.* Such shifting is one
B continuous process in the evaluation of evidence. *According to s. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.* It is this onus that we are concerned with in the present appeal.

C (emphasis added)

[52] In a civil suit, the legal burden of proof does not shift from the party that desires the court to give judgment as to any legal right or liability. As explained by the Singapore Court of Appeal in *SCT Technologies Pte Ltd v. Wester Copper Co Ltd* [2015] SGCA 7; [2016] 1 SLR 1471 ("*SCT*
D *Technologies*"), "once it is established who bears the legal burden of proof, it will remain fixed on the party who bears it throughout the course of the trial, never shifting regardless of the evidence that is led." The Singapore Court of Appeal in an earlier case of *Britestone Pte Ltd v. Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855; [2007] SGCA 47 ("*Britestone*") explained
E the difference between "legal burden of proof" and "evidential burden of proof" as follows:

> [58] The term "burden of proof" is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. *The first, designated the legal burden of proof, is,*
F *properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists.* This obligation never shifts in respect of any fact, and only "shifts" in a manner of loose terminology when a legal presumption operates. *The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce*
G *evidence* since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.
>
> (emphasis added)

H **[53]** Unlike the legal burden of proof, the evidential burden can shift from one party to the other depending on the evidence that is adduced at trial by either side: see *Britestone*, *SCT Technologies* and *International Times*. The Federal Court in *International Times* (*supra*) held:

I > According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[54] Section 102 of the EA states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side. Augustine Paul JC (as he then was) in *Aziz Muhamad Din v. PP* [1997] 1 CLJ Supp 523; [1997] 1 BLJ 523; [1996] 5 MLJ 473 at pp. 556 to 557 (CLJ); pp. 497 to 498 (MLJ), HC held that the burden of proof referred to in s. 102 of the EA is the burden of introducing evidence. He said:

> The burden of establishing a case must be contrasted with the burden of introducing evidence (the evidential burden). The former is governed by s. 101 of the Act which states ... The latter is governed by s 102 of the Evidence Act 1950 which states: ...
>
> The burden of establishing a case rests throughout the trial on the party who asserts the affirmative. However, the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side or the other. The distinction between both the burdens was ably explained by Lee Hun Hoe J (as he then was) in *Wong Sieng Ping v. PP* [1967] 1 MLJ 56 at pp 57-58 ...

[55] Lee Hun Hoe J (as he then was) in *Wong Sieng Ping v. PP* [1967] 1 MLJ 56, HC held that the burden of establishing a case rest throughout the trial on the party who asserts the affirmative. Whereas the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side to another.

Who Bears The Legal Burden Of Proof And The Evidential Burden Of Proof In This Writ Action?

[56] This action is the plaintiff's application for an order for child C to undertake a DNA test to determine her paternity. It is the plaintiff's case that he is the biological father of the child. Accordingly, pursuant to s. 101 of the EA, the legal burden of proof is on the plaintiff to prove on balance of probabilities a *prima facie* case that he is the biological father of the child.

[57] However, the evidential burden of proof shifts between the plaintiff and the defendants as evidence is introduced by one party to the other.

Were There Sexual Relations Between The Plaintiff And The First Defendant During Child C's Conception Period, Especially Around September 2007?

[58] Based on the *Mongelli Study* and the *Jukic Study*, this court had found that child C's conception period was between 13 September 2007 and 20 October 2007. This court must next determine whether there was, on a balance of probabilities, sexual intercourse between the plaintiff and the first defendant during the said conception period.

[59] The plaintiff asserts that in August 2007, whilst sleeping in the living room of the first defendant's sister's house, he found "pre-wedding" photographs between the first and second defendants tucked in the side-pocket of the sofa. He confronted the first defendant about her status with the

second defendant. He said that she assured him that he had nothing to worry about and that they had a good future. The plaintiff went on to say that sometime later in the same month, the first defendant told the plaintiff that the wedding dinner between her and the second defendant had been booked and cannot be cancelled. The first defendant assured him that the wedding dinner was only a dinner and not a real wedding. She also told him that the photos were included as a part of the wedding dinner payment and that she had taken the photos for the second defendant's sake.

[60] The plaintiff says that one night in September 2007, the first defendant seeing that he was upset about the wedding dinner, had suggested that they start their own family. The plaintiff said that he and the first defendant had sexual intercourse regularly and that from the day they had agreed to have a family together, all their sexual intercourse involved him ejaculating into her.

[61] According to the plaintiff, a few days after they decided to have a child together, the first defendant told him that she was officially married to the second defendant. He said that although he was very angry with her, he decided to give her time as he still loved her. He said that as the first defendant told him that she never had sex with the second defendant, he asked her to get an annulment of her marriage with the second defendant at once. He said the first defendant agreed to annul her marriage and asked him to give her time. However, she did not annul her marriage with the second defendant.

[62] The plaintiff was asked by his counsel whether he continued to have sexual intercourse with the first defendant after finding out about her marriage with the second defendant. He answered yes. He was also asked whether he still agreed to have a child with the first defendant even after finding out about her marriage. He answered yes. He said it was because the first defendant had assured him that she was making arrangements for an annulment of her marriage to the second defendant and that she never had sex with the second defendant.

[63] The plaintiff said that in January 2008 the first defendant told him that she was pregnant. She told him that he was the father of the child. He was asked by his counsel whether his feelings for the first defendant had changed. He said that it did not but as time passed, he began to have some doubts as to whether the first defendant was telling him the truth. He said that he checked with the first defendant how positive she was that the child was his and the first defendant told him that she was certain. The plaintiff said that he told the first defendant to get an annulment of her marriage to the second defendant before her pregnancy was visible.

[64] The plaintiff's mother ("PW3") also gave oral evidence that the first defendant had told her that the plaintiff is the father of the child. PW3 said that to convince her that child C is the plaintiff's, the first defendant told her that the name "C" was chosen for the child because it resembles the plaintiff's name.

[65] The plaintiff said that when the first defendant's pregnancy became obvious, he asked her why the second defendant did not ask her about the pregnancy since he had never had sex with the first defendant. He said that the first defendant told him that it was because after finding out she was pregnant, she had sex with the second defendant. The plaintiff said that he was infuriated by her answer. He said that the first defendant realising his anger, told him that it was not the time to build negative energy as it will affect the baby in her womb. She also told him that she had found a regular doctor to attend to her pregnancy and that he did not need to worry about it.

[66] In their statement of defence, the defendants denied that the first defendant had suggested to the plaintiff that they have a child and start a family. The defendants also denied that the first defendant had sexual intercourse in September 2007, or on occasions thereafter to allegedly fast track a marriage between the plaintiff and her.

[67] Nevertheless, notwithstanding her admission of a sexual relationship with the plaintiff from the end 2005 until January 2014, the first defendant maintains that the plaintiff could not be the biological father of child C because she did not have any sexual relations with the plaintiff during the months of August, September and October 2007.

[68] The first defendant continued to deny that she had told the plaintiff that he is the father of the child. However, she admitted that she had told PW3 that the plaintiff is the child's father. During her examination-in-chief, the first defendant said, "I had called and told his mother that (the plaintiff) was the father of my baby although this was not true".

[69] The defendants did not plead in their statement of defence when the child was conceived. However, during her examination-in-chief, the defendants' counsel, Ms Kiran Dhaliwal, asked the first defendant the additional question (to be numbered as Q33A in her witness statement) "When did you conceive (child C)" and the first defendant answered, "end of September 2007."

[70] Counsel for the plaintiff, Ms Honey Tan, objected to the introduction by the first defendant of the evidence relating to when the child was conceived since it was not pleaded, and because it was being introduced through an additional question to the first defendant's witness statement, after the plaintiff had closed its case. Ms Tan cited the case of *Aik Ming (M)*

Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639, [1995] 2 MLJ 770, where the Court of Appeal held that the two fundamental rules of procedural fairness requires (i) that the evidence led must be in proof of the pleaded case; and (ii) that pursuant to the rule in *Browne v. Dunn* [1893] 6 R 67, a party's case be expressly put to his opponent's material witness when they are under cross-examination.

[71] The plaintiff was recalled for cross-examination by the defendants' counsel on the first defendant's testimony that child C was conceived at the end of September 2007. The plaintiff testified that he did not know when the child was conceived. He maintained his earlier testimony that he had unprotected sexual intercourse with the first defendant during the months of August, September and October 2007.

[72] It is settled law that parties are bound by their pleadings. In *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1; [2018] 3 AMR 259, FC ("*Samuel Naik*"), the Federal Court per Ramly Ali FCJ held:

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment."
>
> [30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC).

[73] The first defendant did not plead when child C was conceived. Therefore, she cannot adduce facts and issues which she had not pleaded: see *Samuel Naik* (*supra*).

[74] Nonetheless, even if she had pleaded that child C was conceived at the end of September 2017, it is a fact within her particular knowledge. Pursuant to s. 103 of the EA, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. Section 103 of the EA states:

> 103. Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[75] Additionally, s. 106 of the EA states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon her. Section 106 of the EA states:

> 106. Burden of proving fact especially within knowledge
>
> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[76] The first defendant wants this court to believe that the child was conceived at the end of September 2007. Therefore, pursuant to s. 103 and s. 106 of the EA, she must prove on a balance of probabilities that child C was conceived at the end of September 2007. Her bare averment is insufficient to prove on a balance of probabilities that child C was conceived at the end of September 2007.

[77] The first defendant did not provide any evidence to support her testimony that the child was conceived at the end of September 2007. She did not produce any evidence as to when her last menstrual period (LMP) was prior to the conception of child C. Such information would normally be recorded by her obstetrician/gynaecologist during her first consultation to enable the doctor to ascertain the possible "due date" for the birth of the child.

[78] She also did not call her obstetrician/gynaecologist as a witness to produce the medical records and to testify whether an ultrasound was conducted on her, what was the due date assigned for child C's birth and whether the due date was premised either by the first defendant's last menstrual period (LMP) or by ultrasound results. As the *Jukic Study* shows from the assigned "due date" of birth, there is a variation of 37 days of actual birth of the child in a healthy pregnancy. In this case, there was also no evidence provided as to whether the first defendant's pregnancy of child C was healthy or otherwise. The only evidence before this court was that the first defendant delivered child C by way of a caesarean section on 23 June 2008.

[79] The plaintiff's case is that he had sexual intercourse with the first defendant in August, September and October 2007 but he does not know exactly when the child was conceived.

[80] The first defendant during her examination-in-chief testified that she could not have met with the plaintiff in August, September and October 2007 because in August 2007, the second defendant "was able to take annual leave for almost a month to be back in KL and help me with our wedding banquet preparations", and the second defendant was regularly home in September 2007. She said that in September 2007, she and the second defendant were very busy sending out their wedding invitations. And that the second defendant and her would go together to hand-deliver the formal invitations

A to their relatives and friends throughout September 2007 right into mid-October 2007. She said, "There was just no time to meet (the plaintiff) from August 2007 right through till after our wedding banquet".

[81] However, under cross-examination, the first defendant admitted that the second defendant was not with her every day in August 2007 because she B was also flying. She also admitted that the second defendant was not with her every day in September 2007 and October 2007.

[82] During re-examination by her counsel, the first defendant said that she was with the second defendant from August because it was his birthday month, and he took leave. She said that if she was not with the second C defendant, she was off to work. As for September 2007, she said that the second defendant was back "earlier of the month" and then from 22 September 2007. She said that 22 September 2007 was the date of their "wedding banquet food tasting at the restaurant', and that on 25 September 2007 she and the second defendant went to Jaya Jusco One Utama to buy D wine, which they carried to the restaurant. She said that on the following days, she and the second defendant went to Cheras together to deliver their invitation cards to her relatives.

[83] The first defendant's testimony during cross-examination and re-examination, contrasts with her testimony during her evidence-in-chief. In E her evidence-in-chief, the first defendant said that she and the second defendant went together throughout September 2007 right into mid-October 2007 to hand-deliver formal invitations to their relatives and friends.

[84] However, during her re-examination, she said that in September 2007, F the second defendant was only back during "earlier in month" and from 22 September 2007 onwards, instead of the whole month of September 2007.

[85] The second defendant under cross-examination testified that he was not physically together with the first defendant for the whole month of August 2007. He said that in September 2007, he was with the first defendant G for three quarters of the month and that in October 2007, he was also with the first defendant for three quarters of the month. When asked by the plaintiff's counsel, the second defendant said that when he was with the first defendant in the months of August, September and October 2007, he was with her for 24 hours a day except for "toilet and other breaks".

H **[86]** The defendants wish this court to believe that they were together during the months of August, September and October 2007. However, the analysis below of their oral evidence shows that this is not in fact true:

(i) August 2007

I The second defendant said that he was with the first defendant for the whole month of August 2007. Whereas the first defendant said that they were not together for the whole month of August, September and October since she was also flying.

(ii) September 2007

The second defendant said that he was with the first defendant for the three quarters of the month of September 2007. The first defendant stated in her witness statement that they were delivering invitation cards throughout "September until mid-October 2007". But under cross-examination, the first defendant admitted that she was not with the second defendant for the whole month of September. And during re-examination, the first defendant said that in September 2007, the second defendant was back in KL "earlier of the month" and from 22 September 2007.

[87] As discussed in para. [75] above, s. 106 of the EA provides that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

[88] Augustine Paul JC (as he then was) in *PP v. Hoo Chee Keong* [1997] 2 CLJ Supp 357; [1997] 2 BLJ 357; [1997] 4 MLJ 451 explained s. 106 is an exception to s. 101 of the EA. He said:

> This section is an exception to s. 101 of the Evidence Act 1950 which lays down the general rule that in a criminal case the burden of proof is on the prosecution and this provision is not intended to relieve it of that duty. It is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

[89] The Federal Court in *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12, [2017] 3 AMR 164, FC referred to s. 106 as an "enigmatic" section. The court held:

> [21] Section 106 of the EA which provides 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him' is a further exception. This enigmatic section is intended to address exceptional circumstances in which it would not be possible or particularly difficult for a party ('the first party') to prove a fact which is only known to the other party ('the second party'), or which can be accessed by the second party with relative ease but cannot be accessed by the first party without considerable difficulty ...

[90] The dates on which the first defendant was flying and when the second defendant was flying in the months of August, September and October 2007, and when the second defendant took leave in August 2007, when he was back in KL in August, September and October 2007, and when he and the first defendant were together in those months are within the personal knowledge of the defendants. Thus, under s. 106 of the EA, the evidential burden of proof is on the defendants to prove these facts.

[91] Nonetheless, during the trial, the defendants did not produce their flight rosters for the months of August, September and October 2007 to show when they were flying in those months. They also did not produce any documents to prove the days on which the second defendant was on leave in August 2007.

[92] In light of the discrepancies in the defendants' oral testimonies as to when they were together in the months of August, September and October 2007 and their failure to provide their flight rosters for that period and any documentary evidence of the second defendant's leave approval for August 2007, I find that the defendants had failed to discharge their evidential burden of proof as regards the dates that the second defendant is back in KL in the months of August, September and October 2007.

[93] The obvious discrepancy between the first defendant's and the second defendant's oral testimonies, and the first defendant's own testimony during her evidence-in-chief, cross-examination and re-examination means that they have failed to prove their case that the first defendant was with the second defendant for the whole months of August, September and October 2007.

[94] Applying the inference under s. 114 of the EA, I also find that the second defendant's claim that he was with the first defendant for 24 hours a day except for "toilet and other breaks" when he was back in KL during the months of August, September and October 2007 to be highly improbable.

[95] The first defendant had told this court that she would meet up with the plaintiff when both the plaintiff and the first defendant were in the country and the second defendant was out of the country on his flight duties. Thus, her clarification during re-examination that the second defendant was back in KL "earlier of the month" of September and from 22 September 2007, means that there are several days in September 2007 between "earlier of the month" and 22 September 2007 ("the unaccounted days") that the first defendant and the plaintiff could have met up and engaged in sexual intercourse.

[96] The fact that "the unaccounted days" in September 2007 falls within the conception period of child C, goes to support the plaintiff's case that on a balance of probabilities there were sexual relations between him and the first defendant during the conception period, especially around September 2007.

[97] Accordingly, based on the evidence before this court, I find that the plaintiff has discharged his legal burden of proof that on a balance of probabilities that he had sexual intercourse with the first defendant during child C's conception period, particularly in September 2007.

[98] On the defendants' issue to be tried of whether there was access and therefore sexual relations between the first defendant and the second defendant at the time the child was conceived, the Court of Appeal in *CAS v. MPPL & Anor (No. 1)* had held that as s. 112 of the EA does not prevent enquiry into paternity, there is no need to prove "non-access" by the second defendant to the first defendant. It follows that the proof of access by the first defendant's husband *ie,* the second defendant to the first defendant does not disprove the plaintiff's claim that he had sexual intercourse with the first defendant during the child's conception period. The fact that the second defendant had access and sexual intercourse with the first defendant at the time child C was conceived does not in any way cancel or extinguish any proof that the plaintiff too had access and sexual intercourse with the first defendant during the child's conception period.

Was The Plaintiff Told By The First Defendant That He Is The Biological Father Of The Child?

[99] To support his case, the plaintiff claims that the first defendant had told him on a number of occasions that he is the biological father of the child. He also said that he had checked with her how positive she was that the child that she was carrying was his and she had told him that she was certain that he is the father of the child.

[100] The plaintiff had given direct oral evidence that the first defendant had told him that he is the biological father of the child. His mother, PW3 had also given direct oral evidence that the first defendant had told her that the plaintiff is the father of the child. PW3 said that to convince her that child C is the plaintiff's, the first defendant told her that the name "C" was chosen for the child because it resembles the plaintiff's name.

[101] The defendants in their statement of defence denied that the first defendant had told the plaintiff that he was the biological father of child C.

[102] Pursuant to ss. 101 and 102 of the EA, the burden of proof and the onus of providing the evidence is on the plaintiff to prove, on a balance of probabilities, that the first defendant had told him that the child was his. This is because the plaintiff would fail to prove his claim if no evidence at all was given on either side.

[103] During the trial, the first defendant continued to deny that she had told the plaintiff that he is the father of the child. But she admitted that she had told PW3 that the plaintiff is the child's father. During her examination-in-chief, the first defendant said "I had called and told his mother that (the plaintiff) was the father of my baby although this was not true".

[104] The fact remains that PW3 had given direct oral evidence in court that the first defendant had told her that the plaintiff is child C's father and that she had told PW3 that the child was named "C" because it resembles the

plaintiff's name. The first defendant admitted that she had told PW3 that the plaintiff is the child's father but claims that what she had told PW3 is not true.

[105] The question for this court is when did the first defendant lie? Did she lie when she told PW3 that the plaintiff is the father of the child? Or did she lie during the trial when she said what she had told PW3 was not true?

[106] The challenge this court faces is that the first defendant has told so many untruths – not only to this court, but also to the Court of Appeal and the Federal Court – that it is difficult to tell what she says is true or untrue from her demeanour alone. Additionally, based on her own testimony, she had successfully carried out an extra-marital relationship with the plaintiff for over six years without her husband knowing.

[107] Therefore, this court must consider all the other available evidence and the conduct of the parties against the oral testimonies of the witnesses in order to decide whether the plaintiff has discharged his burden of proving that the first defendant had told him that the child is his.

[108] The first defendant's email to the plaintiff dated 30 April 2008 (p. 267 of bundle C3, forming part of the documents marked collectively as exh. "P1") shows her asking him whether he would like to take her out for dinner on 26 May 2008, approximately a month before child C's birth. The email reads as follows:

> Hi [plaintiff].
>
> TQ for sending me your roster ... would you be free on the 26th after your arrival from Medan? Would you like to bring me out for dinner? Well, it's a month time from now, and I hope [C] is not too eager to come out yet!

[109] The plaintiff in his email dated 4 May 2008 replied that he is "very happy to leave my time free" and asked her "would you like us to meet on the 26th night or the 27th night?" The first defendant in her email dated 20 May 2008 informed the plaintiff that she is craving for kebab and houmous. The plaintiff in his reply on the same day suggested that they go to the Turkish restaurant at Le Meridien. The first defendant replied on 21 May 2008 that since the plaintiff was bringing her to a five-star hotel, she would have to wear a dress "but please don't ask me to lift up my dress to see [C]."

[110] Both her emails of 30 April 2008 and 21 May 2008 show that she had told the plaintiff that the baby she is carrying is a girl and that the baby's name is "C".

[111] In her witness statement at A23, the first defendant said that she and the second defendant were informed by the doctor on 3 March 2008 that she was expecting a baby girl. She said that the second defendant and her

mutually agreed that they should name the baby "Cay ...". She said that they had added the middle name "A ... na" for the child because she had always liked the name "A ... ra". She said "I wanted my baby's name to be connected to mine. I have been using the name "M ... A ... ra" for my email address and on the credit cards since before I met the second defendant."

[112] The name C is almost similar in pronunciation with the plaintiff's first name – the only difference is the "ay" in child C's name from the "o" in the plaintiff's first name. Both the plaintiff's name and the child's name are two syllables: the first syllable of the plaintiff's first name is "Co ..." and the child's first name is "Cay ...". The second syllable of their names, although spelt differently, is pronounced the same.

[113] The plaintiff further claims that he had been involved in child C's life since her birth until the first defendant stopped his access to the child in December 2013. He testified that he saw the child on the third day of her birth when the first defendant invited him to the hospital.

[114] In an email dated 10 February 2009 (at p. 286 of bundle C3, part of the correspondence between the plaintiff and the first defendant, collectively marked as "P1"), the first defendant signed off the email as "your wife-to-be and daughter".

[115] Under cross-examination, the first defendant admitted that child C called the plaintiff "D", which stands for ''daddy'. However, she tried to explain it away by saying that although the child called the plaintiff "D" for "daddy', it was for the future as to when she and the plaintiff had a life together. She says that the child refers to the second defendant as "papa".

[116] However, the fact that the child C refers to the plaintiff as "daddy' can also be seen from the valentine's card from the first defendant to the plaintiff (on p. 693 of bundle C2, marked as exh. "P2"). In the valentine's card, the first defendant wrote "Only for you (the plaintiff's middle name) honey ... you are the only valentine for me, with all my heart to you (the first defendant's Chinese name) SLK". On the next page of the valentine's card, the first defendant wrote "Dearest: (the plaintiff's middle name) honey. She wrote a long message declaring her love for the plaintiff and signed it off "I love you, (the plaintiff's middle name), (her first name), (child C) love you, daddy."

[117] The plaintiff had testified that the first defendant and him had nicknames for each other – "Sweetie Lou Por (SLP)" and "Honey Lou Koong (HLK)" and that they had signed off notes to each other with the initials "SLP" and ''HLK". This can be seen in their emails to each other and in the valentine's card in exh. "P2".

[118] The fact that the plaintiff is referred to as "daddy' by the child is also evidenced from the scrapbook that the first defendant had put together (in pp. 690 to 692 of bundle C2, marked as exh. "P17") after their holiday in Kuantan in October 2008. It was entitled "*The Story of Our Family*". The plaintiff was referred to "daddy", the first defendant as "mommy" and child C as "little girl". On the last page of the scrapbook, the first defendant had written:

LITTLE GIRL C.A.S	
MOMMY M.A.S	DADDY C.A.S

[119] Their names were written in full in the scrap book, where the first defendant had adopted the plaintiff's surname "S" for both her and child C. Not only is child C's first name almost similar in pronunciation with the plaintiff's but with the use of plaintiff's surname, their initials are the same.

[120] On the "Happy Father's Day" card on p. 694 of bundle C3 (marked as exh. "P18(a)") from the child to the plaintiff, it is written "This is to certify that C.A.S. is the "world's most loving daddy". You are fantastic, cool, funny, thoughtful, patient, charming & brilliant. Thank you for being so understanding. And for your unconditional love. Happy Father's Day". The card is signed off with the child's first name "C".

[121] The evidence shows that the plaintiff and the first defendant celebrated the child's first birthday together (see the photographs in exh. "P31") with friends at McDonalds restaurant. The photograph at p. 309 of bundle C4 (part of exh. "P31") shows that the words iced on the child's birthday cake were "Happy Birthday C.A.S." The cake was not iced with the child's name on her birth certificate (in exh. "D76"), which is "C.A.H.Y.W." "S" is the plaintiff's surname. The "H" in the child's name in her birth certificate is her legal surname and the second defendant's surname.

[122] Additionally, the first defendant's WhatsApp message to the plaintiff on 21 May 2013 (part of exh. "P3" in bundle B3) shows that first defendant had wished the plaintiff "happy parents' day".

[123] Based on the available evidence before me, I find that it is improbable that if the first defendant had not told the plaintiff that he is the father of the child, she would tell him the unborn child's name whilst she was still pregnant (as she did in her emails of 30 April 2008 and 21 May 2008), and that she would name the child with a name so similar to that of the plaintiff's, where the only difference between the pronunciation of the plaintiff's name and the child's name is the "o" in the first syllable of his name and the "ay' in the first syllable of her name. It is also highly improbable for a woman to refer to a man as "daddy" to her child, to send him a "Happy Father's

Day card" signed-off by the child, and to wish him "happy parent's day" in her text message to him, if she had not told the said man that he is the father of her child.

[124] Furthermore, it is highly improbable for a woman who has not told a man that he is the father of her child to send him a valentine's card which is signed off by the said child with the words "love you, daddy", to prepare him a scrapbook of their holiday together where the child's name is written as "C.A.S." – where she adopts his surname and where he is referred to as "daddy', and to celebrate the child's first birthday together with friends in public, where the child's name on the birthday cake was iced as "C.A.S." – again adopting his surname instead of her actual surname.

[125] I find that these documents and photographs, together with the fact that (i) she had invited the plaintiff to the hospital after the birth of the child, particularly since she said that he was the only non-family member who had visited her and the child in the hospital, (ii) that she had invited him into her matrimonial home two weeks after the child's birth after the second defendant had gone back to work in Singapore, and (iii) that she told the plaintiff's mother that the plaintiff is the child's father, proves on a balance of probabilities, that she had told the plaintiff that he is the father of the child.

[126] For these reasons, I find that the plaintiff has discharged his burden of proving on a balance of probabilities that the first defendant had told him that he is the father of child C.

Did The Plaintiff Have Access To The Child After Her Birth And Was Involved In Her Life, Until December 2013?

[127] The defendants in their defence deny that the plaintiff had access to child C and that he was involved in her life until the first defendant stopped his access to her in December 2013. In para. 7 of her affidavits in support of her application to strike out the plaintiff's OS in the High Court (affirmed on 20 November 2015), the first defendant averred that during the child's birth she stayed in the hospital for three days and that the second defendant stayed overnight in the hospital throughout.

[128] However, during the trial, the first defendant admitted that the plaintiff had visited her and the child at the hospital on 25 June 2008 and that the plaintiff was her only friend *ie,* non-family member that had visited her at the hospital after the child's birth. Her admission corroborates the plaintiff's testimony that he had visited the first defendant on the third day of the child's birth when the first defendant invited him to see her at the hospital. It also shows that her averment in the OS that the second defendant had stayed throughout her three-day hospital stay was untrue. It is implausible for the second defendant to have been at the hospital with the first defendant during the plaintiff's visit with the first defendant and the child.

[129] The fact that the plaintiff had visited the first defendant and the child at hospital after her birth was corroborated by the plaintiff's mother, PW3. PW3 testified that the first defendant had told her that the plaintiff had visited her at the hospital after the child was born. PW3's testimony on this fact was not challenged by the defendants' counsel during cross-examination.

[130] In this writ action, the plaintiff had produced before this court photographs and videos of the plaintiff with the first defendant and the child, which he says were deleted by the first defendant from the plaintiff's laptop and phone. The plaintiff said that after the hearing of his appeal at the Court of Appeal, with the use of retrieval software, he managed to retrieve many of these photographs. The plaintiff's testimony that the first defendant had deleted the photographs and videos and that the plaintiff had retrieved them were not challenged during cross-examination.

[131] He said that about 85% of the photographs and videos were recovered. Under cross-examination, he agreed with the defendants' counsel's suggestion that approximately 90% of the deleted photographs and videos were recovered. Also exhibited are photographs which the plaintiff said were sent to him by the first defendant, and emails and WhatsApp messages between the plaintiff and first defendant.

[132] Only photographs and videos that have been admitted as evidence and marked as exhibits during the trial, are referred to in this judgment.

– June 2008

[133] The photograph of the plaintiff and the child at the top of p. 269 of bundle C1 shows the plaintiff with the child as baby wrapped up in a blanket in what appears to be a hospital cot. At the hearing before this court on 10 July 2019, counsel for the plaintiff and the defendants agreed by consent to admit this photo as evidence and for the photo to be marked as exh. "P58". There is no metadata/EXIF information of the photograph showing the date. However, based on the photo and the fact that child C was born on 23 June 2008, on a balance of probabilities, this photo was taken in June 2008 when the plaintiff visited the child and the first defendant at the hospital after the child's birth.

– July 2008

[134] The photographs at the bottom of p. 269 and on pp. 271 and 274 of bundle C1 (part of the photographs marked collectively as exh. "P7") show the plaintiff sitting on a sofa feeding the child from a milk bottle. The metadata/EXIF information of the photographs shows that they were taken on 11 July 2008.

[135] The photographs at p. 277 of bundle C2 (part of the photographs marked collectively as exh. "P7") show the plaintiff sitting in a sofa and holding up the child. The metadata/EXIF information of the photographs shows that they were taken on 11 July 2008.

[136] The photographs at p. 280 and at the top of p. 298 of bundle C1 (part of the photographs marked collectively as exh. "P7") show the plaintiff feeding the child, and the photographs at pp. 286, 289, 292 and 295 (part of the photographs marked collectively as exh. "P7") show the plaintiff sitting on a sofa holding the child. The metadata/EXIF information of the photographs shows that they were taken on 12 July 2008.

[137] The photographs at the bottom of p. 298 and on pp. 301, 303, and 307 (part of the photographs marked collectively as exh. "P7") show the plaintiff holding the child next to a baby's cot and the photograph at p. 310, shows the plaintiff leaning into a baby's cot with the child laying inside the cot. The metadata/EXIF information of the photographs shows that they were all taken on 13 July 2008.

– *September And October 2008*

[138] The photographs of the plaintiff and the child at pp. 313 to 377 of bundle C1 (part of the photographs marked collectively as exh. "P8") show the plaintiff carrying the child either in a baby-carrier or in his arms at shopping centres and at restaurants. The metadata/EXIF information of the photographs shows that they were taken on 27 September 2008, 2 October 2008, 12 October 2008, 16 October 2008.

[139] The photographs at pp. 364, 367, 370 and at the top of p. 373 of bundle C1 (part of the photographs marked collectively as exh. "P8") show the plaintiff sitting on a bed and feeding the child. The metadata/EXIF information of the photographs shows that they were taken on 17 October 2008.

– *Trip To Kuantan From 25 To 27 October 2008*

[140] The emails at pp. 278 and 279 of bundle C3 (marked collectively as part of exh. "P1") show that the plaintiff, the first defendant and the child stayed at the Hyatt Regency Kuantan Resort from 25 to 27 October 2008. The plaintiff in his email dated 19 October 2008 to the Hyatt Regency Kuantan Resort (on p. 279 of bundle C3) stated that he would like to book a stay at the hotel from 25 to 27 October 2008 and he had referred to the first defendant and the child in the email as "my wife and baby girl."

[141] The photographs at pp. 378 to 428 of bundle C1, (marked collectively as exh. "P9") show that the plaintiff and the first defendant went on a holiday to Kuantan, together with child C. The metadata of the photographs shows that they were taken on 25, 26 and 27 October 2008, which tie with their stay at the Hyatt Regency Kuantan Resort.

[142] The air stewardess in the photographs at p. 426 of bundle C1 at exh. "P9", testified in court as the fourth witness for the plaintiff ("PW4"). PW4 said that she was a leading stewardess around October 2008. She said that she met the plaintiff, the first defendant and child C on the flight from

Kuantan. She said that they were sitting in the business class section of the plane. PW4 confirmed that she was in the airline uniform in the photograph at p. 426 of bundle C3. PW4 said that she was quite shocked to see the plaintiff, the first defendant and the child together because as she knew the first defendant was married to another pilot from the Singapore-based airline and not the plaintiff. She said that she thought that the first defendant has ended her relationship with the Singapore-based airline pilot and started a family with the plaintiff. She said that she had a quick chat with the first defendant on the flight, who told PW4 that she had resigned from the Malaysia-based airline to concentrate on the care of their baby.

[143] The photographs at the bottom of p. 373 and p. 376 (part of the photographs marked collectively as exh. "P8") show the plaintiff carrying the child in a baby carrier outside a restaurant. The metadata/EXIF information of the photographs shows that they were taken on 28 October 2008.

– November And December 2008

[144] The photographs at pp. 429 and 452 of bundle C1 (part of the photographs marked collectively as exh. "P10") show the plaintiff together with the first defendant and the child. The metadata/EXIF information of the photographs shows that they were taken on 21 November 2008, 27 November 2008, 1 December 2008, 6 December 2008. The photograph at the bottom of p. 429 shows the plaintiff and the first defendant next to each other on a platform in a shopping centre with the first defendant's arm on the plaintiff's thigh with the child sitting between them, on the plaintiff's thigh. The photographs on pp. 435 and 438 shows the plaintiff and the defendant standing next to each other in front of the platform decorated with the Christmas trees, where on p. 435 the first defendant's arm wrapped around the plaintiff's waist and the plaintiff holding the child, and on p. 438 the plaintiff had his hand wrapped around the first defendant's waist.

– December 2008

[145] The photographs on p. 441 and at the top of p. 444 of bundle C1 (part of the photographs marked collectively as exh. "P10"), which based on metadata/EXIF information of the photographs show that they were taken on 1 December 2008, show the plaintiff, the first defendant and the child at a restaurant table, where the plaintiff and the first defendant were sitting next to each other and the child between them – where in the photograph at the bottom of p. 441 and at the top of p. 444, the plaintiff had his arms around the first defendant's shoulder and the child asleep in her arms.

[146] The photographs at the bottom of p. 444 show the plaintiff asleep on the bed with the child and on the photographs on pp. 447 and 450 show the plaintiff with the child on the bed. The metadata/EXIF information of the photographs shows that they were taken on 6 December 2008.

– *January 2009*

[147] The photographs on pp. 453 to 470 of bundle C3 (marked collectively as exh. "P11") show the plaintiff, the first defendant and the child on holiday in Genting Highlands. The metadata/EXIF information of the photographs shows that they were taken on 1 January 2009 – New Year's Day of 2009.

[148] The photographs at pp. 471 to 637 of bundle C2 are marked collectively as exh. "P12". The photographs on pp. 471 and 474 show the plaintiff sitting on a sofa in a home with the child on him. The photographs on p. 477 and the top of p. 480 are "selfies" of the plaintiff and the first defendant and the child on the same sofa. The metadata/EXIF information of the photograph shows that they were taken on 13 January 2009.

[149] The photograph at the bottom of p. 480 shows the plaintiff carrying the baby in front of him on a baby carrier. The metadata/EXIF information of the photograph shows that it was taken on 14 January 2009.

[150] The photographs at pp. 483, 486 and at the top of p. 489 show the plaintiff sitting with the child in his arms on a sofa. The metadata/EXIF information of the photographs shows that they were taken on 20 January 2009.

– *February 2009*

[151] The photograph at the bottom of p. 489 shows the child sleeping next to the first defendant on a bed. The metadata/EXIF information of the photograph shows that was taken on 2 February 2009 at around 6pm. The photographs on pp. 492, 495, 498 and the top of p. 501 show the plaintiff sitting with the child on his lap on a bed. The metadata/EXIF information of the photographs shows that they were taken on 3 February 2009 in the morning at around 10am. The photographs at the bottom of p. 501 and pp. 504, 507 and 510 show the plaintiff and the child in a "soft-play" gym/play area for babies. The metadata/EXIF information of the photographs show that they were also taken on 3 February 2009 but in the afternoon at around 3.30pm.

[152] The photographs at p. 513 and the top of p. 516 show the plaintiff in a red mandarin-collared shirt and the first defendant in a cheongsam at home. The metadata/EXIF information of the photographs show that they were taken on 4 February 2009 at around 1.30pm. The photograph at the bottom of p. 516 shows the plaintiff holding the child on a seesaw with a swimming pool and apartment block in the background. The metadata/EXIF information of the photograph shows that it was taken on the same day as the photo of them in festive clothes on 4 February 2009 but at the later time of 3.41pm.

[153] The photographs at pp. 519 and 522 show the plaintiff feeding the child who is sitting in baby-walker in a living room of a home. The metadata/EXIF information of the photographs shows that they were taken on 13 February 2009 at around 1.22pm.

– March 2009

[154] The photographs at p. 525 and the top of p. 528 show the plaintiff carrying the child in a building, which states "Department of Civil Aviation" on the wall. The metadata/EXIF information of the photographs shows that they were taken on 30 March 2009 at around 3.25pm. The photograph at the bottom of p. 528 shows the plaintiff with the child on his lap sitting in a restaurant. The metadata/EXIF information of the photograph shows that it was taken on 30 March 2009 at around 2.40pm.

[155] The photograph at the top of p. 351 shows the child on a bed with a hand on her ear. The metadata/EXIF information of the photograph shows that it was taken on 26 March 2009 at 10.56am. The photographs at the bottom of pp. 528 and 534 show the plaintiff with the child in a restaurant. The metadata/EXIF information of the photographs shows that they were taken on 26 March 2009 at 6.21pm. The photograph at the top of p. 537 shows the plaintiff, the first defendant and the child (in the same restaurant as the photographs at pp. 528 and 534) with the first defendant holding a bouquet of flowers and the plaintiff's arm around the first defendant. The metadata/EXIF information of the photograph shows that it was taken on 26 March 2009 at 6.30pm.

[156] The photograph at the bottom of p. 537 shows the plaintiff carrying the child outside a supermarket and the photographs at p. 540 show the plaintiff and the child in a supermarket. The metadata/EXIF information of the photographs shows that they were taken on 27 March 2009 at 8.49pm.

[157] The photograph at the top of p. 543 shows the plaintiff bending over the child who is in a pram, next to three plastic bags of shopping full of toys in front of an elevator. The metadata/EXIF information of the photographs shows that they were taken on 28 March 2009 at 11.12am.

[158] The photographs on the bottom of pp. 543, 546 and 549 show the plaintiff in a t-shirt and boxer shorts sitting on a play mat in a living room playing with the toys with the child. The metadata/EXIF information of the photographs shows that they were taken on 28 March 2009 at between 5.31 and 5.42pm.

– April 2009

[159] The photograph at the top of the p. 555 shows the plaintiff carrying the child in a living room with two people eating in the background – it is not clear who these two people are. The metadata/EXIF information of the photograph shows that it was taken on 21 April 2009 at 2.38pm.

– *May 2009*

[160] The photographs at the bottom of pp. 555, 558 and the top of p. 561 show the child drinking out of a bottle on the plaintiff's lap. The metadata/EXIF information of the photographs shows that they were taken on 13 May 2009 at 4.36pm.

[161] The photograph at the bottom of p. 561 shows the plaintiff and the first defendant with the child on the plaintiff's arm standing in front of what appears to be a restaurant. The metadata/EXIF information of the photograph shows that it was taken on 13 May 2009 at 7.08pm.

– *The Plaintiff's Birthday In May 2009*

[162] The photographs at the bottom of the p. 564 and on p. 567 show the plaintiff, the first defendant and the child sitting around a dining table in a living room with party hats and a slice of cake with one candle on it. The plaintiff and the first defendant were wearing t-shirts and shorts. The metadata/EXIF information of the photographs shows that they were taken on 26 May 2009 at 9.45pm and 9.47pm.

[163] The photograph at the p. 564 shows the plaintiff with his arm wrapped around the first defendant and the child in the first defendant's arm in front of a doorway with a curtain. The metadata/EXIF information of the photograph shows that it was taken on 27 May 2009 at 6.55pm, which is the plaintiff's birthday.

[164] The photographs on p. 570 show the plaintiff and the first defendant only sitting around the same dining table in the same living room as the photo taken on 26 May 2009, wearing party hats and a bigger slice of cake with more candles on it. The plaintiff was wearing the same t-shirt and shorts that he wore in the photo of them with the child taken the day before. The first defendant was wearing a different t-shirt and she does not appear to be wearing any bottoms. The metadata/EXIF information of the photographs shows that they were taken on 27 May 2009 at 10.10pm and 10.13pm.

[165] The photographs on pp. 573 and 576 were of the plaintiff carrying the child in a zoo – there are animals in enclosures behind them in the photos. The metadata/EXIF information of the photographs shows that they were taken on 28 May 2009 from 3.13pm to 5.16pm.

[166] Based on these photos, it appears that the plaintiff had spent his birthday with the first defendant and the child from 26 to 28 May 2009.

– *June 2009*

[167] The photographs on p. 579 of bundle C2 (part of the photographs marked collectively as exh. "P12"), show the plaintiff kneeling besides the child who is in a stroller in what appears to be a shopping centre. The metadata/EXIF information of the photographs shows that they were taken

on 11 June 2009 at 3.04pm. The photographs in pp. 582, 585 and 588 show the plaintiff carrying the child in front of a clothing shop. The metadata/EXIF information of the photographs shows that they were taken on 11 June 2009 at 3.59pm.

[168] The photographs on pp. 309, 312, 315, 318, 321, 324, 327 and 330 of bundle C4 (marked collectively as exh. "P31") show the plaintiff, the first defendant and the child celebrating the child's first birthday with a group of friends and their children at McDonalds. The metadata/EXIF information of the photographs shows that they were taken on 12 June 2009 from 5.23pm to 5.41pm. The first defendant was wearing a party hat and the child in a pink party dress with roses in all the photographs.

[169] The photograph at the top of p. 309 of bundle C4 shows the birthday cake is in the shape of a number "1". The words iced on the cake were "Happy Birthday C.A.S.", and not her name on her birth certificate (in exh. "D76"), which is "C.A.H.Y.W.". "S" is the plaintiff's surname. Whilst "H" in the child's name in her birth certificate is the second defendant's surname and "Y.W." is the child's Chinese name.

[170] The photograph at the bottom of p. 315 shows the plaintiff and the first defendant holding the child in front of the birthday cake and the plaintiff blowing the birthday cake.

[171] The photograph at the top of p. 312 of bundle C4 (part of exh. "P31") is the same as the photograph at the top of p. 591 of bundle C2 (part of the photographs marked collectively as exh. "P12"). It shows the plaintiff and the first defendant holding the child, sitting next to each other and looking at the camera, at the child's first birthday party at McDonalds.

[172] The photographs at the bottom of pp. 591, 594, 597, and the top of p. 600 show that the plaintiff and the first defendant with the child with the plaintiff giving the child a box of toys and there is a box wrapped in a "happy birthday" wrapper next to them and a photo of the child with a new toy. The metadata/EXIF information of the photographs shows that the photographs were taken on 12 June 2009 from 7.19 to 7.24pm. The child was no longer in a party dress. But the plaintiff and the first defendant were in the same outfits that they wore at McDonalds minus the party hat.

– July 2009

[173] The metadata/EXIF information of the photographs on pp. 603, 607 and 609, show the photographs of the plaintiff with the child in a shopping centre on 17 July 2009.

[174] The metadata/EXIF information of the photographs on pp. 612, 615, 618, 621, 624, 627, 630, 633, 636 shows the photographs of the plaintiff with the child in a water park/swimming pool on 24 July 2009.

– *September 2010*

[175] The photograph at the top of p. 643 shows the plaintiff and the child walking on a beam outdoors. The metadata/EXIF information of the photograph shows it was taken on 21 September 2010 at 5.20pm.

[176] The photograph at the bottom of p. 643 shows the plaintiff, the first defendant and the child sitting on a sofa indoors, with the plaintiff's and first defendant's arms wrapped around each other and the child sitting between them on the first defendant's lap. The metadata/EXIF information of the photograph shows it was taken on 22 September 2010 at 11.03am.

– *October 2010*

[177] The photograph on p. 638 shows the plaintiff and the child and the photograph on p. 641 shows the first defendant and the child out in the evening with the PETRONAS Twin Towers behind them. The metadata/EXIF information of the photographs shows the photographs were taken on 29 October 2010 at around 8pm.

[178] The video recording taken on 23 October 2010 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(e)") shows the plaintiff and the first defendant at the barber shop, where the barber is cutting the child's hair. The plaintiff can be seen in mirror videoing the child's hair being cut and the first defendant standing next to him. The first defendant is seen in the video walking in front and behind the child. The video lasts for nine mins and 56 seconds.

[179] The video recording on 28 October 2010 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(a)") shows the child dancing to Indian music in the living room of a house. The child comes down the stairs with the plaintiff and she continues to dance. He reclines on a sofa. She then jumps on to him and continues to dance to the music. The plaintiff can be heard to say to her "daddy watching you dance. Daddy enjoy watching you dance". The first defendant can be heard in the background saying, "I love you". She later says, "I'll make coffee, I'll make coffee" and the plaintiff saying, "I'll make coffee" and she says, "I'll make, I'll make."

[180] The first defendant's sister ("PW2") testified that the video of the child dancing to the Indian music was taken at her house.

[181] Another video recording on 28 October 2010 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(d)") shows the plaintiff, the first defendant and the child eating in a food court. The first defendant was videoing them eating. She starts with the child, where she asks "Is it nice, [C] ..." Then the plaintiff can be heard saying "You can try to video father now". And the first defendant replying, "doing video now". She then videos the plaintiff, where he waves at her and says "hello".

A *– 2011*

[182] The photographs on pp. 646 to 658 show the plaintiff with the child and the first defendant. The metadata/EXIF information of the photographs show the photographs were taken on 19 March 2019, 28 March 2019, 17 April 2011 and 25 August 2011.

B

[183] The video shot on 14 March 2011 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(f)") shows the child speaking to the plaintiff in a shopping centre, where she shows him a hat that she had picked up and tried to give it to the plaintiff. The plaintiff can be heard saying "careful. It's too, it's too big for me. It's for you. Too big for me. Nah, give you back". The C child then put the hat on her head. She then asks the plaintiff "Where's mummy'. The plaintiff replied, "Mummy trying on clothes".

[184] The video shot on 17 April 2011 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(g)") shows the child skipping around near the D entrance of a shop in a shopping centre with the plaintiff's voice heard in the background. The next video shows the child in a car on a carousel in the arcade or shopping centre they are in.

[185] The video dated 25 August 2011 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(i)") is a video of the plaintiff, the first defendant E and child having dinner in Melaka. The video shows the plaintiff and the child with her books. The first defendant asked "What are you doing there? What are you all doing?'. The plaintiff answered, "We are reading this book" and the child saying "No". They then talked about the child's Elmo books. The plaintiff told the child "You got a good collection of storybooks" and F she answered "Yes, I got a bag there, I put all the storybooks." The second video (on CD attached to p. 696 of bundle C2, marked as exh. "P20(j)") of the dinner in Melaka on 25 August 2011 shows the plaintiff teasing the child that he thought that he heard her passing wind. And the child denying that she had passed wind and said that it was the plaintiff or the first defendant. The plaintiff and the defendant continued to tease the child about passing G wind and passing motion and her not eating vegetables.

[186] The video dated 30 September 2011 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(k)") shows the plaintiff, the first defendant and child having dinner at a food court. It shows the child finishing the H chocolate in her bowl and licking the bowl. The plaintiff and the first defendant can be heard teasing the child about eating the chocolate and asking her to wash her hands after she finished eating.

– 2012

I **[187]** The photographs on pp. 662 to 679 of bundle C2 are marked as exh. "P16", show the plaintiff and the child in a food court. The metadata/ EXIF information of the photographs shows the photographs were taken on 30 January 2012.

[188] The video dated 30 January 2012 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(b)") shows whilst the plaintiff was eating and talking to the first defendant who was behind the video camera, the child playfully put a pencil into the back of the plaintiff's shirt and saying to the plaintiff "You find, I tell you". The plaintiff then takes out the pencil and smilingly asks the child "You are giving. Let me check. Who do you think did this?''.

[189] A video dated 1 September 2012 (on CD attached to p. 696 of bundle C2, marked as exh. "P20(c)") shows the plaintiff and the child playfully pressing their foreheads against each other.

[190] There are other photographs of the plaintiff with the first defendant and/or the child or the plaintiff with the child or the first defendant and the child. However, the photographs were not accompanied by the metadata/ EXIF information. These photographs were admitted as evidence by consent of the plaintiff's and defendants' counsel at a hearing before me on 10 July 2019 and marked as exhibits. Description of the photographs and the markings are detailed in the table below:

NO	DESCRIPTION & DATE	BUNDLES & PAGES			EXHIBIT NO.
		C1	C2	C4	
1.	Photo of plaintiff and 1st defendant without a date	268			"P57"
2.	Photo of plaintiff and child C • see para. [133] above	269(T)			"P58"
3.	Photos of plaintiff, 1st defendant's and child's trip to Macau and Hong Kong		661		"P59"
4.	Photos of plaintiff and child around July to August 2012		680-682		"P65"
5.	Photos of plaintiff, 1st defendant and child at a Hot Air Balloon with a modified date of 02.05.2014			572-581	"P65"
6.	Photo of plaintiff with child at a food stall with a modified date of 16.10.2013.			587(B)	"P66"
7.	Photo of plaintiff, 1st defendant and child with what appears to be a "Happy Birthday" sign on a cake with a modified date of 18.09.2011.			600(T)	"P66"

[191] I find these photographs and videos show that the plaintiff had access to and was involved in the child's life from her birth until his access to the child was stopped by the first defendant in December 2013.

[192] The first defendant's admission that the plaintiff visited her and the child at the hospital after her birth and that she had called the plaintiff to help her with the child when the child was two weeks old, and her testimony below, corroborates the plaintiff's assertion that he had access to the child from her birth until the first defendant stopped his access to the child in December 2013. The first defendant's testimony is reproduced below:

DW1:	By the end of 2013, I told (the plaintiff that it was not good for (child C) to be with me when I was seeing him and carrying on our affair. (The plaintiff) was not taking any steps to build a family with us and I did not think it wise for (child C) to be exposed any further to (the plaintiff) or our affair. She was five years old and beginning to be more aware of things happening around her. (The plaintiff) had no issue with that. I continued to see (the plaintiff) after dropping (child C) at school.

[193] The photographs show that the plaintiff and the first defendant had an intimate relationship. The photographs also show that the plaintiff acted as the father figure and the first defendant acted as the mother figure of the child. They show them celebrating the child's first birthday together with friends, going on holidays together (to Kuantan in October 2008, to Genting Highlands to celebrate New Year 2009, to Macau and Hong Kong), taking the child for outings such as going to the zoo, to see a hot air balloon, eating out at restaurants and shopping at shopping centres. These are activities that parents would do with their children.

[194] To my mind, any third party looking at the videos of the plaintiff, the first defendant and the child would conclude that they were a family unit, where the plaintiff is the father and the first defendant is the mother of the child – the way they interact together and with the child when she had her haircut at the barber; the pride in the plaintiff's face when the child was dancing to the Indian music and the ease at which she was interacting with him and dancing all over him when he laying on the sofa; the child putting the pencil at the back of his shirt when they were eating at the food court; the child showing the plaintiff her storybooks and them going through her story books during their dinner in Melaka; and the plaintiff and the defendant teasing the child in one video about the amount of chocolate she was eating and in another of her passing wind; the child sharing her food with the plaintiff and the child helping the plaintiff put on a hat whilst they waited for the first defendant shopping.

[195] For these reasons, I find that the plaintiff has discharged his burden of proof that on balance of probabilities the plaintiff did have access to the child since her birth until December 2013.

Did The First Defendant Lead A Double Life With The Plaintiff?

[196] The first defendant denied that she had led a double life with the plaintiff. When asked why, she said it was because they do not have a house together and they do not live together. She said that the plaintiff was just an affair.

[197] The dates and times on the metadata/EXIF information of the photographs show several occasions that the plaintiff would be with the first defendant from morning until night for a few days at a stretch. The dates and times of several of the photographs show the plaintiff feeding the child on a bed or a sofa in the morning and them being out at a shopping mall or restaurant in the afternoon and them at home in the evening. There are also photos of the plaintiff sitting in his boxer shorts playing with the child on the living room floor of the house; and him sitting with the child on a bed or a sofa in a living room, the first defendant sleeping with the child on a bed with her breasts partly exposed and her celebrating his birthday at night at the dining table of the house with only a t-shirt on. These photographs show how familiar and comfortable they are with each other.

[198] The first defendant said that she would see the plaintiff when he was not on flight duty and the second defendant was away on flight duty. This is partly true because the facts show that she had invited the plaintiff to see her and the child in the hospital even though the second defendant was in the country and we know from the first defendant's testimony that the second defendant only went back to Singapore when the child was two weeks old.

[199] The first defendant had testified that she had invited the plaintiff to her home when the child was two weeks old to help her with the child. She did not dispute the plaintiff's claim that he was a familiar face with the confinement lady and the breast-feeding consultant that came to the house. She only said that it was she who called for a nurse for a post-natal home visit and not him. She said "(the plaintiff) did not deal with my breast-feeding issues even though I had mentioned it to him and he was with me at that time."

[200] The photograph at exh. "P31" of the plaintiff and the first defendant celebrating the child's first birthday with friends and their family at McDonalds, where the child's name on the birthday cake was "C.A.S" *ie,* the child's surname is the same as the plaintiff's surname. McDonalds is a public place. The birthday party and the child's name on the cake would

A have conveyed the message to the friends who attended the birthday party that the plaintiff and the first defendant are proud parents celebrating their child's first birthday and that the plaintiff is the child's father.

[201] The first defendant's colleague, the stewardess, PW4, who was on duty on their flight home from Kuantan had referred to the child as the B plaintiff's and the first defendant's daughter. She said that she was quite shocked when she saw them. She testified "As I know, (the first defendant) was married to another co-pilot from the (Singapore-based airline), not (the plaintiff) ... I thought the (the first defendant) had ended her relationship with that (Singapore-based airline) co-pilot and started a family with C (the plaintiff)".

[202] The WhatsApp conversation between the plaintiff and the first defendant shown on pp. 16 to 29 of bundle B3 (marked collectively as exh. "B3") shows their conversation included mundane issues such as which backpack to get for the child, the condition of the child's stool, the child has D a high fever, buying a poodle for the child, the child's swimming lessons – all not uncommon topics discussed between parents of children. The messages also show the plaintiff giving the first defendant his flight roster from time to time. The WhatsApp messages also show that at 8.52am on 21 May 2013, the first defendant sent the plaintiff a message "Morning ..., E Happy Parents Day".

[203] If it was only an affair with the plaintiff as the first defendant claims, she would be having her sexual relations with the plaintiff at somewhere neutral like a hotel room. She would not have invited the plaintiff to stay in her matrimonial home whenever the plaintiff is in KL and her husband is F away. She would also not have involved the plaintiff in the child's life for more than five years – as is evident from the photographs, the videos, and the WhatsApp messages. She would also not have wished someone she was just having an affair with "Happy Parents' Day" or that he was "world's most loving daddy". She would not have celebrated the child's first birthday party G with the plaintiff and his friends at a public place such as McDonalds. And she would not have signed off her valentine's card to him (exh. "P2"), with the words "Love you, daddy" next to the child's name, or make a hand-written scrap book after their Kuantan holiday together (exh. "P17"). She also would not have asked the child to call the plaintiff "D" for daddy in H preparation for the future when she leaves her husband and sets up home with him. The excerpt of the first defendant's testimony on this subject is reproduced below:

I

Plaintiff Counsel 1 (PC1):	[1st defendant], you had admitted that [child C] calls [the plaintiff] D, why D?
DW1:	It was a name suggested by [the plaintiff] himself, to playhouse with me.
PC1:	My instructions are not that's not true, and that D is actually the initial for Daddy, do you agree with me?
DW1:	I would love for [child C] to call him Daddy, if one day that I can with [the plaintiff] because I have really thought of leaving my husband of [the plaintiff], that's why I asked [the plaintiff] to give us a home because I comes with the child, whenever I go my child will come with me.
PC1:	[1st defendant], you just need to say yes. so the answer is yes, right? D is for Daddy, is that correct? Just answer yes or no.
DW1:	**Yes, for in the future. He must be a daddy to [child C].** (emphasis added)

[204] Furthermore, if it was only an affair between her and the plaintiff, the first defendant would not have been upset that she was not asked to take a photo with the plaintiff and his family during his cousin's wedding. Both the plaintiff and his mother, PW3, testified that the first defendant had asked why she was not invited to be in the plaintiff's family photo at his cousin's wedding. PW3 said that she told the plaintiff that the first defendant is not family. During the trial, the defendants' counsel cross-examined PW3 at length as to why she did not want to introduce the first defendant to the family at the wedding. This can be seen from the excerpt of the defendants' counsel's cross-examination of the PW3 reproduced below:

Defendants Counsel 2 (DC2):	Yes, So Mdm [T], by this time, by that 15th November 2008, you already knew that [the first defendant] had a child, correct?
PW3:	Yes
DC2:	And that was why you told [the first defendant] that you couldn't introduce her to the family at the wedding?
PW3:	Yes.
DC2:	So isn't [it] true Mdm [T] that you did not want to accept [the first defendant] or her child?
PW3:	It is just that on that occasion, I just told her that you know I can't introduce her to the family.
DC2:	And you had you had ...

PW3:	I wouldn't know, I wouldn't know what to say.
DC2:	You had even told your son that [the first defendant] was not part of the family, isn't that so?
PW3:	When he when he asked me, he told me [the first defendant] asked him why is it that you know, she's not invited to take photograph, she was not invited to take photograph with the family. I told him that she is not she is not part of the family because it was a family photograph.
DC2:	So you were not accepting of her, correct?
PW3:	It is not so much of accepting, it's, she's not like officially a family member or anything, and it's a family photograph.
DC2:	No, you said you cannot even introduce her to the family.
PW3:	What am I going to introduce her as?
DC2:	So you had problems accepting [the first defendant], wouldn't you say.
PW3:	I wont want to have somebody's wife, introduce her as my son's girlfriend or anything.
DC2:	So Mdm [T] it comes back to the fact that you did not accept [the first defendant], yes or no?
PW3:	Accept her, may I ask accept her in what way am I supposed to accept her?
DC2:	But your son has brought her to this wedding. So in that role, that somebody that your son has brought, somebody that he had wanted to include in the family photo.
PW3:	He didn't.
DC2:	Because he actually ask you.
PW3:	He didn't ask me to include her, he just told me [the first defendant] asked him why she's not included. And that was after everything has finished.

[205] In my view, the aforementioned evidence shows that the first defendant had led a double-life with the plaintiff *vis-a-vis* her husband, the second defendant. It was not just an affair as she claims – the first defendant had been playing happy families with the plaintiff for more than five years since the child was two weeks old. From her own testimony, the first defendant said that she had contemplated leaving the second defendant for the plaintiff and had asked the child to refer to the plaintiff as "D" for "daddy"

in preparation for the time when she does set up home with the plaintiff. As can be seen from the cross-examination of PW3 by the defendants' counsel, the first defendant had expected that she be accepted by the plaintiff's mother as a member of his family and that she be included in a photograph with the rest of the plaintiff's family. A married woman who is "just having an affair" with a man would not expect the said man's mother to accept her as a member of the man's family and to be included in his family photographs. She would also not have instructed her counsel to cross-examine her lover's mother at length as to why she was not accepted as being part of his family and not invited to be in a photograph with family.

Did The Plaintiff Provide The First Defendant Maintenance For Child C Until The First Defendant Closed Her Bank Account At Maybank?

[206] The plaintiff's case is that he had contributed financially to the child's maintenance since she was born until the first defendant closed her bank account at Maybank. In para. 5.19 of his statement of claim, the plaintiff pleaded that he paid the first defendant RM1,000 per month as maintenance for the child and occasionally he would pay the first defendant in cash. He pleaded that after his relationship with the first defendant broke down, he increased the monthly maintenance payment to RM3,000. He said that the payments stopped when the first defendant closed her bank account in or around August 2014.

[207] The plaintiff's relevant bank accounts were produced in pp. 30 to 256 of bundle B3 during the trial and were marked as exh. "P4". The first defendant's savings account at Maybank for the years 2010 to 2013 were produced in pp. 17 to 32 of bundle B2 (marked collectively as exh. "P28"). And her young savers account held jointly with the child at Standard Chartered Bank was produced in pp. 33 and 34 of bundle B2 (marked collectively as exh. "P29").

[208] The plaintiff was unable to show, during the trial, the exact amount of the sums transferred. Although his bank statements show that transfers were made, they do not show to whose account the said transfers were made. There were also discrepancies between the dates of the transfers and the amounts transferred in his testimony as compared to that in the bank statements. Additionally, payments which he says were made by cash to the first defendant, were not reflected in the bank statements.

[209] The defendants in their defence deny that the plaintiff had paid any maintenance for the child. In para. 2.8 of their defence, the defendants pleaded:

> The plaintiff had never paid maintenance for the child, the second defendant throughout bearing all the child's expenses and maintaining her since her birth.

[210] Nevertheless, during the trial the first defendant admitted that the plaintiff did pay RM1,000 monthly into her Maybank account, although she said the monies were for her and were not maintenance for the child. She also admitted that the plaintiff had paid the monies into her Maybank account until she closed the account in December 2014. The excerpt of her testimony on this subject is reproduced below:

DW1:	Sometime in 2010, to test the level of [the plaintiff's] commitment to our relationship, I did ask [the plaintiff] to give me RM1,000 monthly for my personal spending. I made this request while I was still struggling with my depressions and experiencing uncertainties generally. [The plaintiff] had not shown any move to be committed to me. ... When [the plaintiff] agreed to giving me some money, it gave me some sense of [the plaintiff] being committed to our relationship. At no time was this money meant for [child C], [the second defendant] bearing all of [child C's] expenses. This sum was never paid consistently, with various sums paid at different time. [The plaintiff] had deposited these monies into my Maybank account. I eventually closed my Maybank account in December 2014.

[211] The question of whether the plaintiff had paid monies into the first defendant's Maybank account falls within the principle underlying the second principle in s. 102 of the EA.

[212] The first defendant had admitted that the plaintiff had paid the sum of RM1,000 monthly into her bank account at Maybank from sometime in 2010 until she closed her Maybank account in August 2014. However, she positively asserted that the monies paid by the plaintiff into her Maybank account were for her personal spending and not for child C. She also said that all the child's expenses were borne by the second defendant. The defendants had pleaded that the second defendant had borne all the child's expenses and maintained her since birth.

[213] Hence, pursuant to s. 102 of the EA, the burden is on the defendants to prove that the monies paid by the plaintiff into the first defendant's bank account was for the first defendant and not the child and that all the child's expenses were borne by the second defendant.

[214] Furthermore, s. 103 of the EA sets out the general rule as to where the burden of proof as to a particular fact lies. In this instant case, it is the first defendant who had asserted and wishes this court to believe the monies paid by the plaintiff into her account were for her own personal spending and not for the maintenance of the child and that all the child's expenses were borne by the second defendant. Therefore, s. 103 places the burden of proving those facts on the defendants.

[215] Additionally, s. 106 of the EA places the burden of proof of this particular fact on the defendants. Whether the monies paid by plaintiff into the first defendant's Maybank account were for her own personal spending and not for the maintenance of child C is within the first defendant's knowledge. And the fact whether all the child's expenses and maintenance were borne by the second defendant is also within the defendants' knowledge. Therefore, the burden of proving these facts lies with the defendants.

[216] The defendants did not provide any documentary evidence in court to prove that the monies paid by the plaintiff into the first defendant's bank account at Maybank was for her personal spending and not for the child's maintenance. They also did not provide any evidence to prove that all the child's expenses and maintenance were all borne by the second defendant. Accordingly, the defendants failed to discharge their burden of proof.

[217] It follows that the first defendant's admission that the plaintiff had paid the sum of RM1,000 monthly into her bank account until her bank account was closed in August 2014, and the defendants' failure to discharge their burden of proof under ss. 102, 103 and 106 of the EA that the monies were for the first defendant's spending and not the child's maintenance, and that all the child's expenses were borne by the second defendant, means that the plaintiff had successfully proven that he had paid monies for the maintenance of the child into the first defendant's bank account at Maybank since 2010 until she had closed the account in August 2014.

Findings Of Fact

[218] For all the reasons above, upon analysing the parties' pleadings, the oral testimonies of the witnesses and the documentary evidence produced during the trial, I find that the plaintiff has discharged his legal burden of proof. He has proven on a balance of probabilities that:

(i) he had intimate and sexual relations with the first defendant prior to and during her marriage to the second defendant until January 2014;

(ii) he had sexual intercourse with the first defendant during child C's conception period, particularly in September 2007;

(iii) the first defendant had told him that he was the father of child C;

(iv) he had access to and was involved in child C's life since her birth until December 2013; and

(v) he had provided the first defendant monies for the child's maintenance until she closed her bank account at Maybank in approximately August 2014.

[219] Accordingly, I find that the plaintiff has proven on a balance of probabilities a *prima facie* case that he may be the biological father of child C.

[220] During the trial, I had the opportunity to observe the facial features of the child in the videos and the photographs submitted in court, particularly those submitted by the defendants showing the child at an older age of approximately 12 years. Comparing the facial features of the child with that of the plaintiff and the defendant's, whom I had observed physically in court, it appears to me that the child's facial features is a combination of the plaintiff and the first defendant's facial features.

[221] Nonetheless, the law is settled that facial resemblance is not relevant evidence of paternity: see *Ng Chian Perng v. Ng Ho Peng* [1998] 2 CLJ (Supp) 227; [1998] 2 MLJ 686; *Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik* [2017] 6 CLJ 668; [2017] 10 MLJ 331. Therefore, this court cannot take into account any facial resemblance between the chid and the plaintiff as relevant evidence in this action.

Question Of Law: Do Courts Have The Power To Order DNA Test On A Child To Determine Paternity?

[222] Having made the finding of fact that the plaintiff has established a *prima facie* case that he may be the biological father of the child, this court now has to consider whether it has the jurisdiction in civil proceedings to order a DNA test on a child to determine the child's paternity.

[223] Whether or not the plaintiff is the biological father of the child can only be conclusively determined by a DNA test on the child and the plaintiff.

[224] There are currently diverging views in our laws on whether the Malaysian courts are empowered to order DNA test in civil proceedings for the purpose of determining paternity.

[225] The plaintiff contends that it is in the best interest of child C to know who her biological parents are and that this court as *parens patriae* has the power to order a DNA test on child C. The defendants disagree. They submit that Malaysian courts do not have the power to order a DNA test in civil proceedings.

[226] Parliament had officially recognised the taking and use of DNA samples as evidence with the passing of the deoxyribonucleic acid (DNA) Identification Act 2009 ("DNA Act"). Also, the Federal Court in *Pathmanabhan Nalliannen v. PP & Other Appeals* [2017] 4 CLJ 137; [2017] 3 MLJ 141; [2017] 3 AMR 105 held that DNA evidence is admissible under ss. 45, 46 and 51 of the EA. Arifin Zakaria CJ delivering the judgment of the Federal Court held that DNA evidence is "basically opinion evidence of an expert."

[227] Our courts have relied on DNA tests and evidence since 1994 to determine paternity. In *Lau Zhan Chen (An Infant By His Mother And Next Friend Lau Fatt Wan (f)) v. Makoto Togase & Ors* [1995] 1 CLJ 841; [1995]

1 AMR 281 ("*Lau Zhan Chen*"), the parents of the child, to prove scientific evidence of paternity had their blood taken for DNA testing, which results confirmed that the first respondent was the biological father of the child with a probability of paternity of 99.96%. The parties in *Lau Zhan Chen* had agreed among themselves to undertake the DNA test in order to prove the paternity of the child and had provided the results of the DNA test in court to support the petitioner's application to legitimise the child under the Legitimacy Act 1961.

[228] The first notable case in Malaysia where a party prayed for the court to order a DNA test was *Peter James Binsted v. Jevencia Autor Partosa* [2000] 2 CLJ 906; [2000] 2 MLJ 569. In that case the applicant mother had applied to the Magistrate's Court under the Married Women and Children (Maintenance) Act 1950 for maintenance for herself. She claimed that she was married to the respondent and that they had a child from the marriage. On the applicant's lawyer's oral application that the parties and the child undergo a DNA test, the Magistrate allowed the application. The respondent appealed the Magistrate's decision to the High Court. KC Vohrah J allowed the appeal and set aside the Magistrate's decision, on the grounds that the Married Women and Children (Maintenance) Act 1950 has no provision to allow any court to make an order for a DNA test. He held that "there is no general power provided by legislation or through common law for any court in Malaysia to order a person to undergo a test to ascertain paternity". He was of the view that subjecting a person to take a DNA test against his will, by way of taking blood, tissue or bone specimen, would amount to hurt within the meaning of s. 319 of the Penal Code. Section 319 of the Penal Code states "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt".

[229] The next case of note is *Lee Lai Ching v. Lim Hooi Teik* [2013] 4 CLJ 107; [2013] 2 AMR 628; [2013] 4 MLJ 272 ("*Lee Lai Ching No. 1*"). The plaintiff mother in that case claimed that she had met the defendant (the putative biological father) at an entertainment centre. The defendant is the managing director of Follow Me Sdn Bhd. He offered her a commercial contract to sing and record song albums for the company. The plaintiff claimed that her relationship with the defendant became intimate after the execution of the contract with the company. The relationship lasted for eight years. The defendant terminated the relationship after the plaintiff refused to undergo an abortion upon falling pregnant. He refused to acknowledge the child who was born to the plaintiff as his son. The plaintiff then filed an application under O. 14A of the Rules of Court 2012 for an order of court for the defendant to undergo a DNA test in order to determine the paternity of the child. Zamani A Rahim J (as he then was) allowed the plaintiff's application based on the inherent power and discretion of the court.

[230] The Court of Appeal allowed the defendant's appeal on the grounds that it was not an appropriate case for the disposal on a point of law without the full trial of the action. It held that the plaintiff must have made out a *prima facie* case against the defendant of a close and intimate relationship between the plaintiff and defendant before an order can be made to compel the defendant to undergo a DNA test to determine the paternity of a minor.

[231] The matter returned to the High Court for trial. The judgment of Lim Chong Fong JC in that case is reported in *Lee Lai Cheng (Suing As The Next Friend Of Lim Chee Zheng And Herself) v. Lim Hooi Teik* [2017] 6 CLJ 668; [2017] 10 MLJ 331 ("*Lee Lai Cheng No. 2*"). His Lordship found that the plaintiff mother had proved on a balance of probabilities that there was a close and intimate relationship between the plaintiff mother and the defendant father. However, he did not grant the order for a DNA test on the ground he did not have the power to do so since the courts' inherent jurisdiction is "limited to prevent injustice or to prevent abuse of process of the court".

[232] Hence, the question is whether Zamani A Rahim J (as he then was) was correct to have held that courts pursuant to its inherent jurisdiction have the power to order an DNA test to determine paternity in *Lee Lai Ching No. 1* or was Lim Chong Fong J in *Lee Lai Cheng No. 2* correct in holding that courts do not have the power to order DNA tests in paternity cases because its inherent jurisdiction is "limited to prevent injustice or to prevent abuse of process of the court"?

Law On Legitimacy And Paternity

[233] The Court of Appeal in *CAS v. MPPL & Anor (No. 1)* held that whilst s. 112 of the EA conclusively presumes legitimacy of a child during the continuance of valid marriage, it does not bar enquiries into paternity. It held that "legitimacy" and "paternity" are two distinct and separate concepts. Nallini Pathmanathan JCA (as she then was) in delivering the judgment of the Court of Appeal held as regards the concept of "paternity" and "legitimacy:

> [24] *We were of the view that the concepts of 'paternity' and 'legitimacy' should necessarily be separated. The former concerns a question of fact; the latter a question of law*. Section 112 of the EA constitutes adjectival law, and it is trite that adjectival law must be interpreted liberally so as not to defeat the rights of parties. This is all the more so when it comes to s. 112 of the EA which dates back to 1872. It is an outdated and anachronistic legal provision that ought to be construed and given effect in line with modern day scientific advancements.
>
> ...
>
> [28] Our law, and indeed the law of many civilised nations, recognises that a child may in fact be an illegitimate child, but, by operation of the law, the said child may still be considered legally legitimate. We seek to illustrate this point.

...

[36] We do not see why the aforementioned principles are not applicable in Malaysia. As we have already held, *s. 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries per se into paternity do not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the said child is not the determining factor when deciding to order a DNA test to determine paternity*. Instead, the best interest of the child to know its biological parents is the larger concern. In this vein, the learned judge fell into error in Her Ladyship's pre-occupation with the supposed fear of illegitimising child C.

(emphasis added)

[234] The Court of Appeal's decision was upheld by the Federal Court in *MPPL & Anor v. CAS* (02(f)-14-03-2018(W) – 29 January 2019).

[235] The Federal Court in the latter case of *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731; [2020] 2 MLJ 277; [2020] 2 AMR 725, reiterated that under Malaysian law, legitimacy and paternity are two distinct concepts. David Wong Dak Wah CJ (Sabah & Sarawak) referring to the Court of Appeal's judgment in *CAS v. MPPL & Anor (No. 1)* held:

[164] To reconcile s. 111 of the Johor Enactment 2003 and s. 112 of the Evidence Act 1950, *we must fall back on the fact that under our law, legitimacy and paternity constitute two distinct concepts*. On this issue, there is at least one case in point *ie,* the judgment of the Court of Appeal in *CAS v. MPPL & Anor* [2019] 2 CLJ 454 which was affirmed by the Federal Court in *MPPL & Anor v. CAS* (02(f)-14-03-2018(W) – 29 January 2019). The facts were these.

[165] The suit was an action by the plaintiff seeking a DNA test to determine the paternity of child C – a female. The plaintiff claimed that he was the father of child C and that she was born as a result of an affair he had with the first defendant. The child was born while the first defendant was married to her husband, the second defendant. At the High Court, the defendants argued that the plaintiff's suit was summarily determinable on a point of law under O. 14A of the Rules of Court 2012, *to wit*, that s. 112 of the Evidence Act 1950 conclusively presumed child C was the legitimate child of the defendants. Allowing the plaintiff's claim would effectively illegitimise child C. The High Court agreed with the defendants' arguments and held that an inquiry into child C's paternity would have the effect of illegitimising her and accordingly dismissed the plaintiff's suit on that point of law.

[166] The question before the Court of Appeal was whether that dismissal on that point of law was correct. It was held that legitimacy and paternity are two distinct concepts. *Section 112 of the Evidence Act 1950 pertains exclusively to legitimacy. Thus, it remained open to the plaintiff to determine paternity*. The Court of Appeal accordingly remitted the matter to the High Court for trial.

A [167] *In my view, the judgment of the Court of Appeal in that case was correct. On a broader note, the effect of separating paternity from legitimacy means that that child could potentially have two fathers – one in law and another in fact*. A paternity test, if positive, would simply prove the fact that the plaintiff in that case was the biological father of the child. But by virtue of s. 112 of the Evidence Act 1950, the birth of child C during the valid marriage between
B the first and second defendants, legally, means that the second defendant is in law the legitimate father of child C. This is because under the said s. 112, the conclusive presumption of legitimacy may only be rebutted by proof of 'non-access'.

(emphasis added)

C **[236]** Accordingly, in Malaysia, the law on legitimacy and paternity as it currently stands is that:

(i) legitimacy and paternity of a child are two separate and distinct concepts; and

D (ii) the presumption of legitimacy under s. 112 of the EA does not bar any enquiries into the paternity of a child.

Is A Birth Certificate Proof Of Paternity?

[237] Learned counsel for the defendants, Ms Kiran Dhaliwal, submits that
E the plaintiff by agreeing that the child's birth certificate be categorised as a Part A document means that plaintiff had agreed and accepted that the contents of the birth certificate are true, and had, accordingly conceded that the second defendant is the biological father of the child. She contends that for this reason the plaintiff's application should be dismissed.

F **[238]** Ms Dhaliwal cited as authority the case of *Tiow Weng Theong v. Melawangi Sdn Bhd* [2019] 2 CLJ 655, where the Court of Appeal held that in an action for defamation, the parties by agreeing to place the email which the plaintiff says contained the impugned statement in Part A of the agreed bundle of documents means that the plaintiff had accepted the truth of the
G contents of the documents and had conceded the impugned statements as true, which in turn means that the defendant's defence of justification had been proven or conceded by the plaintiff.

[239] Unfortunately, she failed to bring to this court's attention that the Federal Court on 28 February 2020, as reported in *Melawangi Sdn Bhd*
H *v. Tiow Weng Theong* [2020] 4 CLJ 1; [2020] 2 AMR 505 had overturned the Court of Appeal's decision and restored the order of the High Court. Therefore, the decision of the Court of Appeal in *Tiow Weng Theong v. Melawangi Sdn Bhd* is no longer good law.

[240] Birth certificates are issued under the Births and Deaths Registration
I Act 1957 ("BDRA 1957"). Section 14 of the BDRA 1957 states that at the time of registering the birth of any child, the Registrar of Births and Deaths (the "Registrar") shall give to the informant a certificate of birth in the prescribed form and certified as required by sub-s. 32(2) of the Act.

[241] An informant is a person qualified under s. 7(2) of the BDRA 1957 to inform the Registrar of the birth of a child. A "father of the child" is one of the qualified persons under s. 7(2). The phrase "father of the child" is not defined in the BDRA 1957.

[242] Birth certificates are also issued under the Adoption Act 1952 ("AA 1952"). Section 25A of the AA 1952 states that upon receipt of an adoption order, the Registrar-General of Births and Deaths (the "Registrar-General"), upon the surrender to him by the child's birth certificate issued under the BDRA 1957, shall issue a birth certificate in respect of the child in the form set out in the Second Schedule of the AA 1952. Section 25A(5) of the AA 1952 states that the birth certificate issued under AA 1952 shall replace the child's birth certificate issued under the BDRA 1957, and "shall for all purposes be known as the certificate of birth of the child". The birth certificate states the name and details of the child and the adoptive parents or parent pursuant to an adoption order.

[243] In the case of an illegitimate child, s. 13 of the BDRA 1957 provides:

> Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother.

[244] The Registrar-General is empowered under s. 17 of the BDRA 1957 to authorise the re-registration of the birth of a person who had become a legitimated person within the meaning of the Legitimacy Act 1961. The Registrar-General shall only authorise the re-registration if the information is furnished by both parents, where (a) under s. 17(1)(a) the name of a person acknowledging himself to be the father of the legitimated person had been entered in the register pursuant to s. 13 of the BDRA 1957, or (b) under s. 17(1)(b) the paternity of the legitimated person has been established by a maintenance order under the Married Women and Children (Maintenance) Act 1950 or by a decree of a court of competent jurisdiction.

[245] From the ordinary and natural reading of ss. 7, 13 and 17 of the BDRA 1957, the phrase "father of the child" in s. 7 does not mean that the man who had provided the information to the Registrar of a child's birth is the biological father of the child.

[246] In the case of an illegitimate child, pursuant to s. 13 of the BDRA 1957, the "father of the child" is the "person who acknowledges himself to be the father of the child".

[247] In this instant case, the second defendant is presumed to be the father of child C by reason of the statutory presumption in s. 112 of the EA that a child born during the child's mother's valid marriage to a man, is the legitimate child of that man. Hence, the second defendant is "father of the child" of child C for purposes of s. 7 of the BDRA 1957 by reason of the said statutory presumption of legitimacy.

[248] For the reasons discussed above, a birth certificate under the BDRA 1957 or the AA 1952 does not prove a child's biological father. Accordingly, I find that the birth certificate of a child, issued either under the BDRA 1957 or the AA 1952, is not proof of the said child's paternity.

The High Court's Inherent Jurisdiction As *Parens Patriae*

[249] The plaintiff's case is that under s. 24(d) of the Courts of Judicature Act 1964 ("CJA 1964") and as *parens patriae*, the High Court has the power to order a child to undertake a DNA test to determine the child's paternity. Section 24(d) of the CJA 1964 reads as follows:

> 24. Without prejudice to the generality of s. 23 the civil jurisdiction of the High Court shall include:
>
> ...
>
> (d) jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants;

[250] Learned counsel for the plaintiff, Ms Honey Tan, submits that pursuant to s. 11 of the Guardianship of Infants Act 1961 ("GIA 1961"), this court shall have regard primarily to the welfare of the child, and where the child has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[251] It is settled law that the High Court as *parens patriae* has inherent jurisdiction over all children in the jurisdiction. The Federal Court in *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 124A; [1981] CLJ (Rep) 65, per Raja Azlan Shah Acting LP, held:

> The High Court in hearing a custody case regarding infants within the jurisdiction is invested with an inherent jurisdiction derived from the Crown's prerogative as *parens patriae*. It is the law of this country as it is the law of India that the welfare and happiness of the infant must be the paramount consideration in child custody adjudication.

[252] Learned counsel for the defendants submits that the High Court does not have the power to order a person to undergo a DNA test in civil proceedings because there are no statutory provisions or common law rules in Malaysia empowering the court to do so.

[253] She argues that whilst the court has the jurisdiction under s. 24(d) of the CJA 1964 to hear matters in relation to infants generally, it lacks the power to order a DNA test on a child to determine the child's paternity because there are no statutory provisions or common law rules capable of granting the High Court with the necessary power to order a DNA test on a child for purposes of determining paternity.

[254] Ms Dhaliwal submits that unlike Malaysia, the court in England is empowered by the express provisions in s. 20(1) of the UK's Family Law Reform Act 1969 ("FLRA 1969"), to give directions for blood tests to be used to ascertain paternity in civil proceedings.

[255] Regretfully, she did not to bring to this court's attention that in England, prior to the enactment of the FLRA 1969, the English Court of Appeal had held that the High Court under its inherent jurisdiction as *parens patriae* has the power to order a blood test of a child where the child's paternity is in issue: see *In Re L (An Infant)* [1967] 3 WLR 1645; [1968] P.119; [1968] 1 All ER 20 ("*In Re L (An Infant)*") and *B (BR) v. B(J)* [1968] P466; [1968] 3 WLR 566; [1968] 2 All ER 1023 ("*B (BR) v. B(J)*").

[256] In *In Re L (An Infant)*, the English Court of Appeal had occasion to decide the question whether the High Court can order a test to be taken of a child's blood in the absence of consent and in face of the opposition of the official solicitor, who was the child's guardian *ad litem*. The facts in *In Re L (An Infant)* are similar to the facts of this instant case, where in that case the husband and wife were married. The wife met another man and had sexual intercourse regularly with the other man. She became pregnant and bore a baby girl. She let her husband believe that the child was his. Like the second defendant in this instant case, the husband in *In Re L (An Infant)* did not know about his wife's affair with the other man. He regarded the baby girl as his child and she was brought up as one of the family. The wife later left the husband and took the child with her. She went to live with the other man and at that stage admitted to their adultery. Lord Denning MR held that as soon as the wife and the other man admitted adultery:

> it became obvious that there is a serious question as to who was the father of the little girl. Was it the husband? Or the other man? It might be either. There were two important factors to consider. One was the presumption of legitimacy. The other was the taking of blood tests. I will deal with them in turn.

[257] Lord Denning held that in proceedings relating to the custody of a child and "in any proceedings where it is in the best interest of the child to have its paternity settled one way or another", any judge of the High Court can order a test to be taken of the child's blood. He said:

> I hold, therefore, that *in proceedings relating to the custody of a child, any judge of the High Court can order a test to be taken of the child's blood. So also in a paternity issue, or any proceedings where it is in the best interests of the child to have*

A *its paternity settled one way or the other, the court can order a blood test*. Even in a petition for divorce on the ground of adultery, the judge can in my view order a blood test on the child for there too the child is vitally affected by the outcome.

(emphasis added)

B **[258]** Lord Denning held that the courts' inherent jurisdiction over children "derives from the right and duty of the Crown as *parens patriae* to take care of those who are not able to take care of themselves." He held:

C This wide jurisdiction of the old Court of Chancery is now vested in the High Court of Justice and can be exercised by any judge of the High Court. ... If a question arises as to the welfare of a child before any judge of the High Court, he can make such order as may be appropriate in the circumstances ...

[259] Abdul Malik Ishak J (as he then was) in *Lau Zhan Chen* (*supra*) said that since *In Re L (An Infant)*, medical science has advanced by leaps and D bounds, whereby through DNA testing the paternity of child can be determined by 99.96% accuracy.

[260] In the latter case of *B (BR) v. B(J)* (*supra*) in 1968, the English Court of Appeal had to decide the question of whether a judge can order a blood E test on a child on a paternity issue, or any other issue. The question before the court was summarised by Sachs LJ as follows:

The sole question posed here today is whether that jurisdiction *qua parens patriae* is limited to what has been referred to as custodial cases where it will be for the benefit of the infant to use that jurisdiction, or whether F the jurisdiction extends to all cases when it would be of benefit to the infant that the test be made. In using the word "benefit" I have in mind the sense in which it is used in the exercise of the court's *parens patriae* functions, ...

[261] The English Court of Appeal in *B (BR) v. B(J)* held that the High Court in the exercise of its jurisdiction as *parens patriae* has the inherent jurisdiction G to order blood tests on a child in any proceedings where it was in best interests of the child. Lord Denning MR held:

It is unnecessary to review the matter at length. That was done in *In re L. (An Infant)*. Suffice it to say that, after full discussion, we see no reason for confining the jurisdiction, as Willmer L.J. did, to the court's custodial H jurisdiction. **The jurisdiction is unlimited in a judge of the High Court. He can order a blood test to be taken whenever it is in the best interests of the child**. I repeat what I said in that case [*In re L (An Infant*)]:

...

I **The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child**. The judges can be trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which judges exercise their

discretion. **The object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires.**

(emphasis added)

[262] Learned counsel for the defendants also did not bring this court's attention to the recent English case of *Spencer v, Spencer And Others* [2016] EWHC 851 (Fam); [2016] Fam 391 ("*Spencer v. Spencer*"). In that case, the High Court of England and Wales had made an order under its inherent jurisdiction directing that the extracted DNA sample of a deceased person be tested posthumously to determine paternity. In that case, the applicant had applied under s. 20 of the FLRA 1969 for an order for the testing of the deceased's DNA sample held by a hospital, alongside the applicant's own DNA to establish whether the deceased was his father.

[263] Whilst there is legislation in the UK that enables the courts to give directions for DNA tests by extracting bodily samples from living persons, in civil proceedings relating to paternity, there is no legislation relating to paternity testing using extracted DNA. Its common ground that the FLRA 1969 does not provide any statutory provision for a court to direct the post-humous testing of a deceased's DNA sample. Thus, the question before the High Court in *Spencer v. Spencer* was whether the courts' inherent jurisdiction could be used to fill the legislative void.

[264] Peter Jackson J (as he then was) in *Spencer v. Spencer* held that the application for the DNA test on a deceased person's DNA sample is outside the scope of s. 20 of the FLRA 1969 – the section only applied to DNA tests and the taking of DNA samples of living persons. He held that in cases where the absence of remedy would lead to injustice, the inherent jurisdiction of the High Court empowered the court to make the order for the DNA testing of a deceased's DNA samples in order to determine paternity.

[265] On appeal by the respondent, the English Court of Appeal upheld the High Court's order: see *Anderson v. Spencer* [2018] EWCA Civ 100 ("*Anderson v. Spencer*"). The Court of Appeal held that the High Court Judge had not fallen into error in finding that he had the power to make such an order pursuant to the High Court's inherent jurisdiction. It held that the judge had been right to hold that such a direction for the DNA test could be made under the court's inherent jurisdiction, even though it fell outside the scope of s. 20 of the FLRA 1969. The Court of Appeal agreed that in order for an extension of inherent jurisdiction to be principled, it was not necessary to slot such extension of jurisdiction into a "previously recognised category." It held that "to do so would constrain the legitimate use of Lord Donaldson's great safety net". King LJ held that the High Court Judge was sensible of the need to avoid any unprincipled extension of the jurisdiction saying:

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71(1) there is a legislative void, both in relation to post-mortem paternity testing and in relation to paternity testing using extracted DNA. I accept that in an area of this kind, policy considerations arise which would be better regulated by Parliament than by individual decisions of the court. *In one sense, this speaks for judicial reticence. However, there is no indication that Parliament has turned its attention to the situation that arises in the present case,*

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or that it is likely to do so at any early date. That gives rise to the possibility of an indefinite period during which individuals would be left without a remedy.

(emphasis added)

[266] Similarly, in India, the Supreme Court of India had held that the

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Indian courts may invoke their inherent power to direct and enforce orders for parties to undergo DNA tests in paternity cases see *Sharda v. Dharmpal* (2003) 4 SCC 493; *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another* (2010) 8 SCC 633.

[267] Section 151 of India's Code of Civil Procedure 1908 is in *pari materia*

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with O. 92 r. 4 of our Rules of Court 2012. It states:

151. Saving of inherent powers of court – Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

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[268] The Supreme Court of India in *Sharda v. Dharmpal* (2003) 4 SCC 493 had reviewed its earlier decision in *Goutam Kundu v. State of West Bengal* [1993] SC 2295 and held:

39. *Goutam Kundu* is, therefore, not an authority for the proposition that under no circumstances the court can direct that blood tests be conducted.

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It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.

[269] In the latter case of *Bhabani Prasad Jena v. Convenor Secretary, Orissa*

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State Commission for Women and Another (2010) 8 SCC 633, the Supreme Court of India clarified that there is no conflict between its decisions in *Goutam Kundu* and *Sharda v. Dharmpal,* where it said:

23. There is no conflict in the two decisions of this court, namely, *Goutam Kundu* and *Sharda*. In *Goutam Kundu* it has been laid down that courts in

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India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong *prima facie* case and the court must carefully examine as to what would be the consequence of ordering the blood test. In *Sharda* while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the

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applicant has a strong *prima facie* case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong *prima facie* case is made out for such a course.

[270] The Indian courts' powers to order a DNA test to determine paternity was succinctly summarised by the Madras High Court in *Selvi Vijayalakshmi v. A Sankaran and Another* [2017] 4 MLJ (Madras Law Journal) 463 as follows:

> 33. Now, what follows from the above analysis of the *ratios* laid down in *Goutam Kundu v. State of West Bengal* (*supra*) and in *Sharda v. Dharmpal* (*supra*) is that *it is not that the courts have no power to order DNA test. It can order, but it cannot be a routine matter because it involves personal freedom of an individual. Only in rare cases and real cases such a test can be ordered, provided there is a prima facie case for ordering such a test.* (See *Bommi and Another v. Manirathanam* (*supra*).
>
> (emphasis added)

[271] The common thread of the Indian and English authorities cited above, is that courts have the power to use their inherent jurisdiction to fill legislative voids.

[272] In India, its Supreme Court has held that the courts have the power pursuant to their inherent jurisdiction to order DNA testing on a child to determine the child's paternity.

[273] Whilst in England, prior to the enactment of s. 20 of the FLRA 1969, the Court of Appeal had held that the High Court as *parens patriae* has the power under its inherent jurisdiction to order a blood test on a child to determine the child's paternity. And after the enactment of the FLRA 1969, the English Court of Appeal in *Anderson v. Spencer* (*supra)* held that the High Court may use its inherent jurisdiction, in the interest of justice, to direct DNA testing to provide evidence of paternity in circumstances falling outside the scope of its FLRA 1969.

[274] In Malaysia, art. 160(2) of our Federal Constitution defines "law" to include:

> written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

[275] "Common law" is defined in s. 3 of the Interpretation Acts 1948 and 1967 as "the common law of England." In *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 AMR 563; [2006] 2 MLJ 389, FC, Abdul Hamid Mohamad FCJ (as he then was) held:

> Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia.

[276] The orders for a blood test on a child to determine the child's paternity by the English Court of Appeal in *In Re L (An Infant)* and *B (BR) v. B(J)* (*supra*), were made pursuant to a long existing English common law principle that the courts have the inherent jurisdiction as *parens patriae* to make whatever order it deems appropriate in the best interest and welfare of a child. Lord Denning MR held that pursuant to this common law principle that the courts as *parens patriae* have the power to order a child in custody cases and in paternity cases to undergo a blood test to determine the child's paternity: see paras. [257] and [261] above.

[277] In *In Re L (An Infant)* Lord Denning had cited Lord Cottenham LC's judgment in *In re Spence* (1847) 2 Ph 247, where it was held that the old Court of Chancery had the power to interfere for the protection of an infant, by virtue of the prerogative which belongs to the Crown as *parens patriae*, by making whatever order as might be appropriate.

[278] It is clear from Lord Cottenham LC's judgment in *In re Spence* in 1847, as applied 120 years later by Lord Denning MR in *In Re L (An Infant)* and *B(BR) v. B(J)* that the common law of England on 7 April 1956 empowers the courts as *parens patriae* to make any order as may be appropriate for the best interest and welfare of a child.

[279] Therefore, I have to respectfully disagree with learned counsel for the defendants' submission that there was no common law of England as administered in England on 7 April 1956 empowering the courts to order a blood test on a child to determine paternity. I find that based on the English common law as administered in England on 7 April 1956, the High Court in Malaysia has the jurisdiction to order a blood test – and with the advances of science, a DNA test – on a child to determine the child's paternity.

[280] The Federal Court in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 12 MLJ 1; [2019] 8 AMR 325, held that common law is law as long it remains in force and that the mechanism for determining of whether it remains in force lies in s. 3(1) of the Civil Law Act 1956 ("CLA 1956"). Section 3(1) of the CLA 1956 reads as follows:

> 3. Application of UK common law, rules or equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> ...

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The Federal Court held that the common law is applicable in Malaysia, subject to the proviso in s. 3(1) of the CLA 1956, unless the common law has been modified, varied or abrogated by written law.

[281] There are presently no written laws in Malaysia governing the power of the courts to order a DNA test on children in civil proceedings. Thus, it follows that there are no written laws in force in Malaysia that has modified, varied or abrogated the common law of England on this issue.

[282] Accordingly, based on the common law of England and under s. 3(1) of the CLA 1956, the courts in Malaysia pursuant to its inherent jurisdiction as *parens patriae* has the power to order that a child undergo a DNA test in order to determine the child's paternity.

[283] Even if the common law of England was not in force in Malaysia by reason of s. 3(1) of the CLA 1956, the case laws of England and India on the subject are of persuasive authority in Malaysia. The Supreme Court of India in *Sharda v. Dharmpal* (*supra*), *Goutam Kundu* (*supra*) and *Bhabani Prasad Jena* (*supra*) and the English Court of Appeal in *In Re L (An Infant)* (*supra*) and in *B (BR) v. B(J)* (*supra*) have all held that the courts have the power to make an order for a child to undergo a DNA test or blood test to determine his or her paternity.

[284] Additionally, the Court of Appeal in the recent case of *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 4 CLJ 354; [2019] AMEJ 1483 ("*Stone World v. Engareh*") had held that courts may extend its inherent jurisdiction "to any instance which requires its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result." Zabariah Mohd Yusof JCA (as she then was) held:

> [62] It is to be noted that *O. 92 r. 4 ROC is merely a declaratory provision which declares that the Rules do not limit or affect the inherent powers of the High Court*. A reminder of the existence of such inherent power was further provided under r. 4. *These inherent powers of the court are intrinsic to a superior court in order to facilitate the proper functioning of it as a court of law*. "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such limited jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process." (*Connelly v. DPP* [1964] AC 1254 at 1301).
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> [63] *Inherent powers of the court are separate and distinct source of jurisdiction from statutory powers of the court. They are residuary and reserve source of power.* The inherent powers of the court are in addition to the powers specifically

A conferred by the rules on the court. They are complementary to those powers. The court is free to exercise them towards the ends of justice or to prevent the abuse of the process of the court. Thus it can be exercised cumulatively and concurrently with other sources of power. It is part of procedural law, not substantive law. It is invoked in relation to the process of litigation ... Their application depends on the circumstances of the case. *The significance of the doctrine of inherent jurisdiction lay in its flexibility, for the court can extend it to any instance which requires its intervention in the absence of precise statutory regulation, or where injustice or abuse might otherwise result*. It should be exercised judiciously and should not be circumscribed by rigid criteria or tests. (*Wee Soon Kim Anthony v. The Law Society of Singapore* (Unreported; Civil Appeal No 6000 of 2001) (*Wee Soon Kim Anthony*). It must not be applied indiscriminately (See *Malaysian Civil Procedure* 2018 vol, 1 p. 1246).

(emphasis added)

[285] Therefore, premised on the Court of Appeal's decision in *Stone World v. Engareh*, in the absence of any statutory or common law power to order a DNA test, the courts nonetheless have the inherent power as *parens patriae* to order the taking of DNA tests on a child to determine paternity.

[286] Accordingly, even if the English common law as administered in England on 7 April 1956 does not provide the English courts with the jurisdiction to order a blood test on a child to determine paternity, and even if the laws of India and England are not of persuasive authority, the courts in Malaysia may extend its inherent jurisdiction as *parens patriae* to fill in the legislative void to order a DNA test on a child to determine his or her paternity.

Is It In The Welfare And Best Interest Of A Child To Know His/Her Biological Parents?

[287] This court has found that the plaintiff has established a *prima facie* case that he had sexual relations with the first defendant during child C's conception period, particularly in September 2007, and that he may be the biological father of child C. This court has also concluded that courts as *parens patriae* have the power to order that a child undertake a DNA test for purposes of determining his or her paternity.

[288] The next question this court must ask itself is whether it is in the best interest and welfare of child C to know her biological father.

[289] The presumption of legitimacy in s. 112 of the EA is worded *verbatim* to s. 112 of the Indian Evidence Act 1872. It was *pari materia* with s. 114(1)(a) and (b) of the Singapore Evidence Act 1893 (Cap 97), until Singapore in 2013 amended the said section to do away with the requirement to prove "non-access". Lord Denning MR in *In Re L (An Infant)* (*supra*) at p. 153 D explained the presumption of legitimacy as follows:

> The presumption of legitimacy goes back for centuries, long before blood tests. In order to decide the paternity of a child, the courts in those days had to rely upon circumstantial evidence. Illegitimacy was a grave stigma: and carried severe penalties on the child. So the courts raised a presumption of legitimacy. When a married woman bore a child, her husband was presumed to be the father unless the contrary was proved. The presumption was so strong that it could not be rebutted except by proof beyond reasonable doubt that the husband was not the father.

[290] The courts in India, Singapore and Malaysia are all of the view that s. 112 of the EA (and the equivalent sections in the Indian and Singapore Evidence Acts) is an outdated provision. The provision was promulgated in the 19th century when, as observed by the Singapore High Court in *AD v. AE* (cited below), it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%, and was premised on the Victorian era view, that it was in the best interest of a child not to illegitimise or "bastardise" the said child.

[291] Even Lord Denning in 1967 was of the view that "there is not nearly the same stigma on illegitimacy as there used to be" and that "the sins of the fathers are no longer visited on the children." He said in *In Re L (An Infant)* at p. 153 F-G:

> Moreover, there is not nearly the same stigma on illegitimacy as there used to be. It can be, and often is, cured by subsequent marriage of the parents. Even when the parents do not marry, the penalties on the child have been largely removed. The sins of the fathers are no longer visited on the children.

[292] Nallini Pathmanathan JCA (as she then was) held in *CAS v. MPPL & Anor (No. 1)*:

> [24] ... s. 112 of the EA which dates back to 1872. It is an outdated and anachronistic legal provision that ought to be construed and given effect in line with modern day scientific advancements."
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> ...
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> [35] However, this 'supposed' policy reasoning behind s. 112 of the EA in not wanting to illegitimise children ought no longer to be the sole judicial philosophy in light of modern day global advancements in science and international human rights law. We find strong support for this view in the judgment of Ravindra Bhat J in *Shri Rohit Shekhar v. Shri Narayan Dutt Tivoari & Anor I A No 4720/2008* .... and we concur with his views.

[293] In Singapore, Choo Han Teck J in *AD v. AE* [2005] SGHC 30; [2005] 2 SLR(R) 180 (a case prior to the amendment of the s. 114 of the Singapore Evidence Act) said:

> [8] Section 114 of the Evidence Act was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. It was intended to avoid bastardising children and the social stigma that attached to it, more

A so in the past than today, perhaps. Although some changes to this section might be necessary to avoid more serious problems than the one before me, it is still useful to have a provision that presumes paternity, provided that it is not, as presently so, an irrebuttable or conclusive presumption.

[294] Crucially, the universal view of what is in the best interest of a child B has moved on since the 19th century. It is now recognised that it is in the best interest of a child to know his or her biological parents. As held by Ravindra Bhat J in *Shri Rohit Shekar v. Shri Narayan Dutt Tiwari & Anor* [IA No. 4720/2008 in CA(OS) 700/2008 decided on 23 December 2010] ("*Shri Rohit Shekar*"):

C 23. **The right of the child to know of her (or his) biological antecedents is now recognised internationally as being of critical importance**. Major international instruments such as the UN Declaration on Human Rights have recognised the rights of a child irrespective of her (or his) legitimacy and the Convention on the Rights of Child, 1990 has expressly specified a right to knowledge of parenthood.

D 24. The Convention therefore, specifically requires that as far as possible, the State must enable the child to know of his true paternity ...

25. A child's right to know of her or his biological parentage has had a critical influence also in many developments in Europe that have led to lifting the anonymity of a donor in assisted pregnancies and in case of E sperm donors. ... **These developments all over the world indicate that there is a very tenable argument in the child's interests that support its right to know the truth of its origin**.

(emphasis added)

[295] It is not just in the best interest of children to know who their F biological parents are. The English Court of Appeal in *Anderson v. Spencer* (*supra*) held that it is in "the interest of the living" to know their biological identity. It held the English High Court was entirely correct to decide that based on the court's inherent jurisdiction, it had the jurisdiction to make the order for the test of the deceased's DNA sample because it was in "the G interests of the living in knowing their biological identity together with the interests of justice including the desirability of knowing the truth".

[296] Malaysia is a member of the United Nations and a signatory to the United Nations Convention on the Rights of the Child ("UNCRC"). It had made reservations to several articles of the UNCRC including art. 7, which H has not been ratified as law in Malaysia. Parliament had incorporated only part of the UNCRC in the Child Act 2001: it had left out, among others, the provisions in art. 7 of the Convention.

[297] Although art. 7 of the UNCRC is not ratified as law, our courts are I charged with the duty to interpret local statutes in a manner where their "language will be in conformity and not in conflict with international law": see *CAS v. MPPL & Anor (No. 1)* and *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769; [2012] 1 MLJ 832.

[298] As stated by the Court of Appeal in *CAS v. MPPL & Anor (No. 1)* international treaties and conventions are not directly applicable to domestic law until and unless they are incorporated into domestic law. But where the law is ambiguous, courts are required to interpret local statutes in a manner "where their language will be in conformity and not in conflict with international law".

[299] Furthermore, member states who are signatories of any conventions of the United Nations, whilst not obliged to ratify such convention into local law, are required "to refrain from acts that would defeat or undermine the treaty's objective and purpose". The United Nations in its publication entitled "*How the Convention on the Rights of the Child works*" states that:

> While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.

[300] As for the statutory provision in s. 112 of the EA, the Court of Appeal in *CAS v. MPPL & Anor (No. 1)* had held the presumption of legitimacy in the said section does not bar enquiries into the paternity of a child. The Court of Appeal held that it is in best interest of a child to know his or her biological parents. Nallini Pathmanathan JCA (as she then was) said:

> [42] (iv) In determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. **'Best interests' here refers to the right of the child to know who his or her biological parents are**. The court ought not to be concerned solely or wholly with fears of 'legitimising the child'. When the factual disputes have been determined, the trial court can then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter. As matters stand, the plaintiff has been effectively deprived of the right to be heard fully.
>
> (emphasis added)

[301] The Court of Appeal's decision in *CAS v. MPPL & Anor (No. 1)* was upheld by the Federal Court. It was cited with approval by the Federal Court in subsequent cases. In *TR Sandah Tabau & Ors v. Director Of Forest, Sarawak & Anor And Other Applications* [2019] 10 CLJ 436; [2019] 6 AMR 526 FC, David Wong Dak Wah CJ (Sabah & Sarawak), held that notwithstanding the non-incorporation of art. 7 of the UNCRC in the Child Act 2001, the Court of Appeal in *CAS v. MPPL & Anor (No. 1)*, "applying the common law presumption on requiring conformity in international law, the Court of Appeal held that art. 7 applied in spirit."

[302] Under the doctrine of *stare decisis*, the Court of Appeal's decision that it is in the best interest of a child to know who his or her biological parents are, is binding on this court.

[303] Moreover, once child C's mother admitted to having sexual relations with the plaintiff, and once this court had made the finding of fact that the first defendant had sexual relations with the plaintiff during child C's conception period, the serious question arises – who is the biological father of child C? Is it the second defendant? Or is it the plaintiff? It could only be either of them. The child has the right to know who her biological father is. It is in her best interest to know who her biological father is. The only way the question of the child's paternity can be resolved conclusively is by way of a DNA test. Science has come a long way from the blood test that Lord Denning referred to in the custody and paternity cases of *In Re L (An Infant)* and *B (BR) v. B(J)* respectively. A DNA test can tell with 99.96% rate of accuracy as to who the father of child C is. In *Lau Zhan Chen* (*supra*), Abdul Malik Ishak J (as he then was) said:

> ... where scientific evidence by means of a blood test, can resolve the issue of paternity conclusively, the interests of justice require that a blood test should be done, in the absence of strong reasons to the contrary.

[304] In this instant case, there are no strong reasons to the contrary as to why the child should not undertake the DNA test. I find that the defendants' counsel's argument that "the child was raised and brought up by the defendants knowing the defendants to be her biological parents" is not a strong enough reason as to why the child should not undertake a DNA test to determine her paternity.

[305] Based on the first defendant's admission to sexual relations with the plaintiff and this court's findings of fact that the plaintiff has made a *prima facie* case that he had sexual intercourse with the first defendant during the child's conception, I disagree with the defendants' counsel's submission that the dispute as regards the child's paternity "has been built purely on speculative assertions". The first defendant had admitted to sexual relations with the plaintiff from 2005 to 2014. She only denies sexual relations with him during the months of August, September and October 2007, which for the reasons discussed above, this court has found to be untrue.

[306] Accordingly, based on these reasons, I am of the opinion that it is in the child's best interest to undergo a DNA test to determine her paternity. Hence, I find that this court ought to make an order for child C to undergo a DNA test to determine her paternity.

[307] Nevertheless, if the DNA test results show that the plaintiff is child C's biological father, in my view, it would be in the child's best interest and welfare that the plaintiff be reintroduced to her gradually and under the guidance and advice of a qualified child psychologist with experience in the disclosure of the biological origins/parents of children.

Decision

[308] Accordingly, for the reasons above, I hereby make the following orders:

(i) that either the first defendant and/or the second defendant shall bring child C to Hospital Tunku Azizah (formerly known as the Kuala Lumpur Women and Children Hospital) ("the hospital") within seven days from the service of the order on the first defendant and/or the second defendant to enable the hospital to take all the necessary steps to obtain specimens, by intimate or non-intimate means as decided by a medical professional at the hospital, from child C and the plaintiff in order for a DNA test be carried out to determine the child's paternity in relation to the plaintiff;

(ii) that if the results of the DNA test show that the plaintiff is the biological father of child C, the following orders be made:

(a) a declaration that the plaintiff is the biological father of the child;

(b) the plaintiff and the first defendant and/or the second defendant shall appoint, within 21 days of the DNA test results or such longer period as mutually agreed by the parties, a qualified child psychologist with experience in the disclosure of the biological origins/parents of children, to advice and guide the parties as to how to reintroduce the plaintiff into child C's life and his access to child C;

(c) if the parties cannot agree on the appointment of the child psychologist with the said 21 days or the mutually agreed period, either the plaintiff or the defendants may apply to this court for the appointment of such suitably qualified and experienced child psychologist; and

(d) the plaintiff is at liberty to apply for further orders relating to his access to child C and the method of payment of maintenance for child C upon receipt of the advice and guidance of the child psychologist.

[309] There is no order as to costs.